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OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

PRESIDENT OF THE UNITED STATES
THE ATTORNEY GENERAL
AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

EDITOR
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Foreword

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the executive, legislative, and judicial branches of the government, and for the convenience of the professional bar and the general public.* The first four volumes of opinions published covered the years 1977 through 1980; the present volume covers primarily 1981. The opinions contained in Volume 5 include some that have previously been released to the public, additional opinions as to which the addressee has agreed to publication, and opinions to Department of Justice officials that the Office of Legal Counsel has determined may be released. A substantial number of Office of Legal Counsel opinions issued during 1981 are not included.

The authority of the Office of Legal Counsel to render legal opinions is derived from the authority of the Attorney General. Under the Judiciary Act of 1789 the Attorney General was authorized to render opinions on questions of law when requested by the President and the heads of executive departments. This authority is now codified at 28 U.S.C. §§ 511–513. Pursuant to 28 U.S.C. § 510 the Attorney General has delegated to the Office of Legal Counsel responsibility for preparing the formal opinions of the Attorney General, rendering informal opinions to the various federal agencies, assisting the Attorney General in the performance of his function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 CFR § 0.25.

Continuing the practice begun in Volume 4, Volume 5 includes the formal Attorney General opinions issued during 1981. These opinions will eventually appear in Volume 43 of the Opinions of the Attorney General.

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*The Editor acknowledges the assistance of Joseph Foote, Esq., in preparing these opinions for publication.

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OPINIONS

OF THE

ATTORNEY GENERAL OF THE UNITED STATES

January 16, 1981, through October 3, 1981

Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations

Statutory authority for an agency to incur obligations in advance of appropriations need not be express, but may be implied from the specific duties that have been imposed upon, or of authorities that have been invested in, the agency.

The "authorized by law" exception in the Antideficiency Act exempts from that Act's general prohibition not only those obligations for which there is statutory authority, but also those obligations necessarily incident to initiatives undertaken within the President's constitutional powers.

A government agency may employ personal services in advance of appropriations only when there is a reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property, and when there is some reasonable likelihood that either or both would be compromised in some degree by delay in the performance of the function in question.

January 16, 1981

THE PRESIDENT
THE WHITE HOUSE

MY DEAR MR. PRESIDENT: You have asked my opinion concerning the scope of currently existing legal and constitutional authorities for the continuance of government functions during a temporary lapse in appropriations, such as the government sustained on October 1, 1980. As you know, some initial determination concerning the extent of these authorities had to be made in the waning hours of the last fiscal year in order to avoid extreme administrative confusion that might have arisen from Congress' failure timely to enact 11 of the 13 anticipated regular appropriations bills,[1] or a continuing resolution to cover the hiatus between regular appropriations. The resulting guidance, which I approved, appeared in a memorandum that the Director of the Office of Management and Budget circulated to the heads of all departments and agencies on September 30, 1980. Your request, in effect, is for a close and more precise analysis of the issues raised by the September 30 memorandum.

Before proceeding with my analysis, I think it useful to place this opinion in the context of my April 25, 1980, opinion to you concerning the applicability of the Antideficiency Act, 31 U.S.C. § 665, upon lapses in appropriations, 43 Op. Att'y Gen. No. 24, 4 Op. O.L.C. 16 (1980). That opinion set forth two essential conclusions. First, if, after the expiration of an agency's appropriations, Congress has enacted no appropriation for the immediately subsequent period, the agency may make no contracts and obligate no further funds except as authorized by law. Second, because no statute generally permits federal agencies to incur obligations without appropriations for the pay of employees, agenices are not, in general, authorized by law to employ the services of their employees upon a lapse in appropriations. My interpretation of the Antideficiency Act in this regard is based on its plain language, its history, and its manifest purposes.

---

[1] Prior to October 1, 1980, Congress had passed regular appropriations for fiscal year 1981 only for energy and water development, Pub. L. No. 96-367, 94 Stat. 1331 (Oct. 1, 1980).

The events prompting your request for my earlier opinion included the prospect that the then-existing temporary appropriations measure for the Federal Trade Commission (FTC) would expire in April, 1980, without extension, and that the FTC might consequently be left without appropriations for a significant period.[2] The FTC did not then suggest that it possesses obligational authorities that are free from a one-year time limitation. Neither did it suggest, based on its interpretation of the law at that time, that the FTC performs emergency functions involving the safety of human life or the protection of property other than protecting government property within the administrative control of the FTC itself. Consequently, the legal questions that the April 25, 1980, opinion addressed were limited. Upon determining that the blanket prohibition expressed in § 665(a) against unauthorized obligations in advance of appropriations is to be applied as written, the opinion added only that the Antideficiency Act does permit agencies that are ceasing their functions to fulfill certain legal obligations connected with the orderly termination of agency operations.[3] The opinion did not consider the more complex legal questions posed by a general congressional failure to enact timely appropriations, or the proper course of action to be followed when no prolonged lapse in appropriations in such a situation is anticipated.

The following analysis is directed to those issues. Under the terms of the Antideficiency Act, the authorities upon which the government may rely for the continuance of functions despite a lapse in appropriations implicates two fundamental questions. Because the proscription of § 665(a) excepts obligations in advance of appropriations that are "authorized by law," it is first necessary to consider which functions this exception comprises. Further, given that § 665(b) expressly permits the government to employ the personal service of its employees in "cases of emergency involving the safety of human life or the protection of property," it is necessary to determine how this category is to be construed. I shall address these questions in turn, bearing in mind that the most useful advice concerning them must be cast chiefly in the form of general principles. The precise application of these principles must, in each case, be determined in light of all the circumstances surrounding a particular lapse in appropriations.

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[2] FTC actually sustained less than a one-day lapse in appropriations between the expiration, on April 30, 1980, of a transfer of funds for its use, Pub. L. No. 96-219, 94 Stat. 128 (Mar. 28, 1980), and the enactment, on May 1, 1980, of an additional transfer, Pub. L. No. 96-240, 94 Stat. 342. Prior to April 30, however, it appeared likely that a protracted congressional dispute concerning the terms of the FTC's eventual authorization, Pub. L. No. 96-252, 94 Stat. 374 (May 28, 1980), would precipitate a lapse in appropriations for a significantly longer period.

[3] *See* note 11, *infra*.

I.

Section 665(a) of Title 31, United States Code provides:

> No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropiation or fund in excess of the amount available therein; *nor shall any officer or employee involve the Government in any contract or obligation, for the payment of money for any purpose, unless such contract or obligation is authorized by law.* (Emphasis added.)

Under the language of § 665(a) emphasized above, it follows that, when an agency's regular appropriation lapses, that agency may not enter contracts or create other obligations unless the agency has legal authority to incur obligations in advance of appropriations. Such authority, in some form, is not uncommon in the government. For example, notwithstanding the lapse of regular appropriations, an agency may continue to have available to it particular funds that are subject to a multi-year or no-year appropriation. A lapse in authority to spend funds under a one-year appropriation would not affect such other authorities. 13 Op. Att'y Gen. 288, 291 (1870).

A more complex problem of interpretation, however, may be presented with respect to obligational authorities that are not manifested in appropriations acts. In a few cases, Congress has expressly authorized agencies to incur obligations without regard to available appropriations.[4] More often, it is necessary to inquire under what circumstances statutes that vest particular functions in government agencies imply authority to create obligations for the accomplishment of those functions despite the lack of current appropriations. This, of course, would be the relevant legal inquiry even if Congress had not enacted the Antideficiency Act; the second phrase of § 665(a) clearly does no more than codify what, in any event and not merely during lapses in appropriations, is a requirement of legal authority for the obligation of public funds.[5]

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[4] *See, e.g.*, 25 U.S.C. § 99; 31 U.S.C. § 668; 41 U.S.C. § 11.

[5] This rule has, in fact, been expressly enacted in some form for 160 of the 191 years since Congress first convened. The Act of May 1, 1820, provided:

> [N]o contract shall hereafter be made by the Secretary of State, or of the Treasury, or

Continued

Previous Attorneys General and the Comptrollers General have had frequent occasion to address, directly or indirectly, the question of implied authority. Whether the broader language of all of their opinions is reconcilable may be doubted, but the conclusions of the relevant opinions fully establish the premise upon which my April 25, 1980, memorandum to you was based: statutory authority to incur obligations in advance of appropriations may be implied as well as express, but may not ordinarily be inferred, in the absence of appropriations, from the kind of broad, categorical authority, standing alone, that often appears, for example, in the organic statutes of government agencies. The authority must be necessarily inferrable from the specific terms of those duties that have been imposed upon, or of those authorities that have been invested in, the officers or employees purporting to obligate funds on behalf of the United States. 15 Op. Att'y Gen. 235, 240 (1877).

Thus, for example, when Congress specifically authorizes contracts to be entered into for the accomplishment of a particular purpose, the delegated officer may negotiate such contracts even before Congress appropriates all the funds necessary for their fulfillment. *E.g.*, 30 Op. Att'y Gen. 332, 333 (1915); 30 Op. Att'y Gen. 186, 193 (1913); 28 Op. Att'y Gen. 466, 469–70 (1910); 25 Op. Att'y Gen. 557, 563 (1906). On the other hand, when authority for the performance of a specific function rests on a particular appropriation that proves inadequate to the fulfillment of its purpose, the responsible officer is not authorized to obligate further funds for that purpose in the absence of additional appropriations. 21 Op. Att'y Gen. 244, 248–50 (1895); 15 Op. Att'y Gen. 235, 240 (1877); 9 Op. Att'y Gen. 18, 19 (1857); 4 Op. Att'y Gen. 600, 601–02 (1847); *accord*, 28 Comp. Gen. 163, 165–66 (1948).

This rule prevails even though the obligation of funds that the official contemplates may be a reasonable means for fulfilling general responsi-

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> of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment.

3 Stat. 567, 568. The Act of March 2, 1861, extended the rule as follows:

> No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.

12 Stat. 214, 220. Congress reiterated the ban on obligations in excess of appropriations by enacting the Antideficiency Act in 1870:

> [I]t shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of appropriations.

Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251. Congress substantially reenacted this provision in 1905, adding the proviso "unless such contract or obligation is authorized by law," Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257, and reenacted it again in 1906, Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 27, 48. Section 665(a) of Title 31, United States Code, enacted in its current form in 1950, Act of Sept. 6, 1950, Pub. L. No. 81–759, § 1211, 64 Stat. 595, 765, is substantially the same as these earlier versions, except that, by adding an express prohibition against unauthorized obligations "in advance of" appropriations to the prohibition against obligations "in excess of" appropriations, the modern version indicates even more forcefully Congress' intent to control the availability of funds to government officers and employees.

bilities that Congress has delegated to the official in broad terms, but without conferring specific authority to enter into contracts or otherwise obligate funds in advance of appropriations. For example, Attorney General McReynolds concluded, in 1913, that the Postmaster General could not obligate funds in excess of appropriations for the employment of temporary and auxiliary mail carriers to maintain regular service, notwithstanding his broad authorities for the carrying of the mails. 30 Op. Att'y Gen. 157, 161 (1913). Similarly, in 1877, Attorney General Devens concluded that the Secretary of War could not, in the absence of appropriations, accept "contributions" of materiel for the army, *e.g.*, ammunition and medical supplies, beyond the Secretary's specific authorities to contract in advance of appropriations. 15 Op. Att'y Gen. 209, 211 (1877).[6]

Ordinarily, then, should an agency's regular one-year appropriation lapse, the "authorized by law" exception to the Antideficiency Act would permit the agency to continue the obligation of funds to the extent that such obligations are: (1) funded by moneys, the obligational authority for which is not limited to one year, *e.g.*, multi-year appropriations; (2) authorized by statutes that expressly permit obligations in advance of appropriations; or (3) authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency.[7] A nearly government-wide lapse, however, such as occurred on October 1, 1980, implicates one further question of executive authority.

Unlike his subordinates, the President performs not only functions that are authorized by statute, but functions authorized by the Constitution as well. To take one obvious example, the President alone, under Article II, § 2, clause 1 of the Constitution, "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Manifestly, Congress could not deprive the President of this power by purporting to deny him the minimum obligational authority sufficient to carry this power into effect. Not all of the President's powers are so specifically enumerated, however, and the question must consequently arise, upon a government-wide lapse in appropriations, whether the Antideficiency Act should be construed as depriving the President of authority to obligate funds in connection with those initiatives that would otherwise fall within the President's powers.

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[6] *Accord*, 37 Comp. Gen. 155, 156 (1957) (Atomic Energy Commission's broad responsibilities under the Atomic Energy Act do not authorize it to enter into a contract for supplies or services to be furnished in a fiscal year subsequent to the year the contract is made); 28 Comp. Gen. 300, 302 (1948) (Treasury Department's discretion to establish reasonable compensation for Bureau of the Mint employees does not confer authority to grant wage increases that would lead to a deficiency).

[7] It was on this basis that I determined, in approving the September 30, 1980, memorandum, that the responsible departments are "authorized by law" to incur obligations in advance of appropriations for the administration of benefit payments under entitlement programs when the funds for the benefit payments themselves are not subject to a one-year appropriation. Certain so-called "entitlement programs," *e.g.*, Old-Age and Survivors Insurance, 42 U.S.C. § 401(a), are funded through trust funds into which a certain portion of the public revenues are automatically appropriated. Notwithstanding this method of funding the entitlement payments themselves, the costs connected with the administration of the trust funds are subject to annual appropriations. 42 U.S.C. § 401(g). It might be argued that a lapse in administrative authority alone should be regarded as expressing Congress' intent that benefit payments also not continue. The continuing appropriation of funds for the benefit payments themselves, however, substantially belies this argument, especially when the benefit payments are to be rendered, at Congress' direction, pursuant to an entitlement formula. In the absence of a contrary legislative history to the benefit program or affirmative congressional measures to terminate the program, I think it proper to infer authority to continue the administration of the program to the extent of the remaining benefit funding.

In my judgment, the Antideficiency Act should not be read as necessarily precluding exercises of executive power through which the President, acting alone or through his subordinates, could have obligated funds in advance of appropriations had the Antideficiency Act not been enacted. With respect to certain of the President's functions, as illustrated above, such an interpretation could raise grave constitutional questions. It is an elementary rule that statutes should be interpreted, if possible, to preclude constitutional doubts, *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932), and this rule should surely be followed in connection with a broad and general statute, such as 31 U.S.C. § 665(a), the history of which indicates no congressional consideration at all of the desirability of limiting otherwise constitutional presidential initiatives. The President, of course, cannot legislate his own obligational authorities; the legislative power rests with Congress. As set forth, however, in Mr. Justice Jackson's seminal concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952):

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress.

Following[8] this reasoning, the Antideficiency Act is not the only source of law or the only exercise of congressional power that must be weighed in determining whether the President has authority for an initiative that obligates funds in advance of appropriations. The President's obligational authority may be strengthened in connection with initiatives that are grounded in the peculiar institutional powers and competency of the President. His authority will be further buttressed in connection with any initiative that is consistent with statutes—and thus with the exercise of legislative power in an area of concurrent authority—that are more narrowly drawn than the Antideficiency Act and that would otherwise authorize the President to carry out his constitutionally assigned tasks in the manner he contemplates. In sum, with respect to any presidential initiative that is grounded in his constitutional role and consistent with statutes other than the Antideficiency Act that are relevant to the initiative, the policy objective of the Antideficiency Act must be considered in undertaking the initiative, but should not alone be regarded as dispositive of the question of authority.

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[8] A majority of the Supreme Court has repeatedly given express endorsement to Mr. Justice Jackson's view of the separation of powers. *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977); *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976); *United States* v. *Nixon*, 418 U.S. 683, 707 (1974); *Old Dominion Branch No. 496, National Association of Letter Carriers* v. *Austin*, 418 U.S. 264, 273 n.5 (1974).

Unfortunately, no catalogue is possible of those exercises of presidential power that may properly obligate funds in advance of appropriations.[9] Clearly, such an exercise of power could most readily be justified if the functions to be performed would assist the President in fulfilling his peculiar constitutional role, and Congress has otherwise authorized those or similar functions to be performed within the control of the President.[10] Other factors to be considered would be the urgency of the initiative and the likely extent to which funds would be obligated in advance of appropriations.

In sum, I construe the "authorized by law" exception contained within 31 U.S.C. § 665(a) as exempting from the prohibition enacted by the second clause of that section not only those obligations in advance of appropriations for which express or implied authority may be found in the enactments of Congress, but also those obligations necessarily incident to presidential intiatives undertaken within his constitutional powers.

II.

In addition to regulating generally obligations in advance of appropriations, the Antideficiency Act further provides, in 31 U.S.C. § 665(b):

> No officer or employee of the United States shall accept voluntary service for the United States or employ per-

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[9] As stated by Attorney General (later Justice) Murphy:

> [T]he Executive has powers not enumerated in the statutes—powers derived not from statutory grants but from the Constitution. It is universally recognized that the constitutional duties of the Executive carry with them constitutional powers necessary for their proper performance. These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. In a measure this is true with respect to most of the powers of the Executive, both constitutional and statutory. The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.

39 Op. Att'y Gen. 343, 347–48 (1939).

[10] One likely category into which certain of these functions would fall would be "the conduct of foreign relations essential to the national security," referred to in the September 30, 1980, memorandum.

> sonal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

Despite the use of the term "voluntary service," the evident concern underlying this provision is not government agencies' acceptance of the benefit of services rendered without compensation. Rather, the original version of § 665(b) was enacted as part of an urgent deficiency appropriation act in 1884, Act of May 1, 1884, ch. 37, 23 Stat. 15, 17, in order to avoid claims for compensation arising from the unauthorized provision of services to the government by non-employees, and claims for additional compensation asserted by government employees performing extra services after hours. That is, under § 665(b), government officers and employees may not involve the government in contracts for *employment*, *i.e.*, for compensated labor, except in emergency situtations. 30 Op. Att'y Gen. 129, 131 (1913).

Under § 665(b), it is thus crucial, in construing the government's authority to continue functions in advance of appropriations, to interpret the phrase "emergencies involving the safety of human life or the protection of property." Although the legislative history of the phrase sheds only dim light on its precise meaning, this history, coupled with an administrative history—of which Congress is fully aware—of the interpretation of an identical phrase in a related budgeting context, suggests two rules for identifying those functions for which government officers may employ personal services for compensation in excess of legal authority other than § 665(b) itself. First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

As originally enacted in 1884, the provision forbade unauthorized employment "except in cases of *sudden* emergency involving the loss of human life or the *destruction* of property." 23 Stat. 17. (Emphasis added.) The clause was added to the House-passed version of the urgent deficiency bill on the floor of the Senate in order to preserve the function of the government's "life-saving stations." One Senator cautioned:

> In other words, at the life-saving stations of the United States, for instance, the officers in charge, no matter what the urgency and what the emergency might be, would be prevented [under the House-passed bill] from using the absolutely necessary aid which is extended to them in such cases because it had not been provided for by law in a statute.

15 Cong. Rec. 2,143 (1884) (remarks of Sen. Beck); *see also id.* at 3,410–11 (remarks of Rep. Randall). This brief discussion confirms what the originally enacted language itself suggests, namely, that Congress initially contemplated only a very narrow exception to what is now § 665(b), to be employed only in cases of dire necessity.

In 1950, however, Congress enacted the modern version of the Antideficiency Act and accepted revised language for 31 U.S.C. § 665(b) that had originally been suggested in a 1947 report to Congress by the Director of the Bureau of the Budget and the Comptroller General. Without elaboration, these officials proposed that "cases of sudden emergency" be amended to "cases of emergency," "loss of human life" to "safety of human life," and "destruction of property" to "protection of property." These changes were not qualified or explained by the report accompanying the 1947 recommendation or by any aspect of the legislative history of the general appropriations act for fiscal year 1951, which included the modern § 665(b). Act of September 6, 1950, Pub. L. No. 81–759, § 1211, 64 Stat. 765. Consequently, we infer from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment. In essence, they replaced the apparent suggestion of a need to show absolute necessity with a phrase more readily suggesting the sufficiency of a showing of reasonable necessity in connection with the safety of human life or the protection of property in general.

This interpretation is buttressed by the history of interpretation by the Bureau of the Budget and its successor, the Office of Management and Budget, of 31 U.S.C. § 665(e), which prohibits the apportionment or reapportionment of appropriated funds in a manner that would indicate the need for a deficiency or supplemental appropriation, except in, among other circumstances, "emergencies involving the safety of human life, [or] the protection of property." § 665(e)(1)(B).[11] Directors

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[11] As provisions containing the same language, enacted at the same time, and aimed at related purposes, the emergency provisions of §§ 665(b) and 665(e)(1)(B) should not be deemed *in pari materia* and given a like construction, *Northcross* v. *Memphis Board of Education*, 412 U.S. 427, 428 (1973), although at first blush, it may appear that the consequences of identifying a function as an "emergency" function may differ under the two provisions. Under § 665(b), if a function is an emergency function, then a federal officer or employee may employ what otherwise would constitute unauthorized personal service for its performance; in this sense, the emergency nature of the function triggers additional obligational authority for the government. In contrast, under § 665(e)(1)(B), if a function is an emergency function, OMB may allow a deficiency apportionment or reapportionment—this permitting the expenditure of funds at a rate that could not be sustained for the entire fiscal year without a deficiency—but the effect of such administrative action would not be to trigger new obligational authority automatically. That is, Congress could always decline to enact a subsequent deficiency appropriation, thus keeping the level of spending at the previously appropriated level.)

This distinction, however, is outweighed by the common practical effect of the two provisions, namely, that when authority is exercised under either emergency exception, Congress, in order to accomplish all those functions it has authorized, must appropriate more money. If, after a deficiency apportionment or reapportionment, Congress did not appropriate additional funds, its purposes would be thwarted to the extent that previously authorized functions could not be continued until the end of the fiscal year. This fact means that, although deficiency apportionments and reapportionments do not create new obligational authority, they frequently impose a necessity for further appropriations as

Continued

of the Bureau of the Budget and of the Office of Management and Budget have granted dozens of deficiency reapportionments under this subsection in the last 30 years, and have apparently imposed no test more stringent than the articulation of a reasonable relationship between the funded activity and the safety of human life or the protection of property. Activities for which deficiency apportionments have been granted on this basis include Federal Bureau of Investigation criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C. §§ 601–695, the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents by the National Transportation Safety Board. These few illustrations demonstrate the common sense approach that has guided the interpretation of § 665(e).[12] Most important, under § 665(e)(2), each apportionment or reapportionment indicating the need for a deficiency or supplemental appropriation has been reported contemporaneously to both Houses of Congress, and, in the face of these reports, Congress has not acted in any way to alter the relevant 1950 wording of § 665(e)(1)(B), which is, in this respect, identical to § 665(b).[13]

It was along these lines that I approved, for purposes of the immediate crisis, the categories of functions that the Director of the Office of Management and Budget included in his September 30, 1980, memorandum, as illustrative of the areas of government activity in which emergencies involving the safety of human life and the protec-

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compelling as the government's employment of personal services in an emergency in advance of appropriations. There is thus no genuine reason for ascribing, as a matter of legal interpretation, greater or lesser scope to one emergency provision than to the other.

[12] In my April 25, 1980, memorandum to you, I opined that the Antideficiency Act permits departments and agencies to terminate operations, upon a lapse in appropriations, in an orderly way. 43 Op. Att'y Gen. No. 24, at 1 [4 Op. O.L.C.—(1980)]. The functions that, in my judgment, the orderly shutdown of an agency for an indefinite period or permanently would entail include the emergency protection, under § 665(b), of the agency's property by its own employees until such protection can be arranged by another agency with appropriations; compliance, within the "authorized by law" exception to § 665(a), with statutes providing for the rights of employees and the protection of government information; and the transfer, also under the "authorized by law" exception to § 665(a), of any matters within the agency's jurisdiction that are also under the jurisdiction of another agency that Congress has funded and thus indicated its intent to pursue. Compliance with the spirit, as well as the letter, of the Antideficiency Act requires that agencies incur obligations for these functions in advance of appropriations only to the minimum extent necessary to the fulfillment of their legal duties and with the end in mind of terminating operations for some substantial period. It would hardly be prudent, much less consistent with the spirit of the Antideficiency Act, for agencies to incur obligations in advance of appropriations in connection with "shutdown functions" that would only be justified by a more substantial lapse in appropriations than the agency, in its best judgment, expects.

[13] The Supreme Court has referred repeatedly to the:

> venerable rule that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 381 (1969) (footnotes omitted). Since enacting the modern Antideficiency Act, including § 665(e)(1)(B), in 1950, Congress has amended the act three times, including one amendment to another aspect of § 665(e). At no time has Congress altered this interpretation of § 665(e)(1)(B) by the Office of Management and Budget, which has been consistent and is consistent with the statute. *Compare* 43 Op. Att'y Gen. No. 24, 4 Op. O.L.C. 16 (1980).

tion of property might arise. To erect the most solid foundation for the Executive Branch's practice in this regard, I would recommend that, in preparing contingency plans for periods of lapsed appropriations, each government department or agency provide for the Director of the Office of Management and Budget some written description, that could be transmitted to Congress, of what the head of the agency, assisted by its general counsel, considers to be the agency's emergency functions.

In suggesting the foregoing principles to guide the interpretation of § 665(b), I must add my view that, in emergency circumstances in which a government agency may employ personal service in excess of legal authority other than § 665(b), it may also, under the authority of § 665(b), it may also, under the authority of § 665(b), incur obligations in advance of appropriations for material to enable the employees involved to meet the emergency successfully. In order to effectuate the legislative intent that underlies a statute, it is ordinarily inferred that a statute "carries with it all means necessary and proper to carry out effectively the purposes of the law." *United States* v. *Louisiana*, 265 F. Supp. 703, 708 (E.D. La. 1966) (three-judge court), *aff'd*, 386 U.S. 270 (1967). Accordingly, when a statute confers authorities generally, those powers and duties necessary to effectuate the statute are implied. *See* 2A J. Sutherland, Statutes and Statutory Construction § 55.04 (Sands ed. 1973). Congress has contemplated expressly, in enacting § 655(b), that emergencies will exist that will justify incurring obligations for employee compensation in advance of appropriations; it must be assumed that, when such an emergency arises, Congress would intend those persons so employed to be able to accomplish their emergency functions with success. Congress, for example, having allowed the government to hire firefighters must surely have intended that water and firetrucks would be available to them.[14]

III.

The foregoing discussion articulates the principles according to which, in my judgment, the Executive can properly identify those functions that the government may continue upon lapses in appropriations. Should a situation again present itself as extreme as the emergency that arose on October 1, 1980, this analysis should assist in guiding planning by all departments and agencies of the government.

As the law is now written, the Nation must rely initially for the efficient operation of government on the timely and responsible functioning of the legislative process. The Constitution and the

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[14] *Accord*, 53 Comp. Gen. 71 (1973), holding that, in light of a determination by the Administrator of General Services that such expenses were "necessarily incidental to the protection of property of the United States during an extreme emergency," *id.* at 74, the Comptroller General would not question General Services Administration (GSA) payments for food for GSA special police who were providing round-the-clock protection for a Bureau of Indian Affairs building that had been occupied without authority.

Antideficiency Act itself leave the Executive leeway to perform essential functions and make the government "workable." Any inconvenience that this system, in extreme circumstances, may bode is outweighed, in my estimation, by the salutary distribution of power that it embodies.

Respectfully,

BENJAMIN R. CIVILETTI

Legality of the International Agreement with Iran and Its Implementing Executive Orders

Executive orders providing for the establishment of escrow accounts with the Bank of England and the Central Bank of Algeria, directing the transfer of previously blocked Iranian government assets to those accounts, and nullifying all interests in the assets other than the interests of Iran and its agents, are within the President's authority under the International Emergency Economic Powers Act (IEEPA). Banks and other holders of Iranian assets need not await formal vacation of court-ordered attachments before complying with transfer orders, since they as well as Executive Branch officials are relieved from any liability for actions taken in good faith in reliance on the IEEPA.

Executive order prohibiting the prosecution of any claims against Iran arising from the hostage seizure, and terminating any previously instituted judicial proceedings based on such a claim, is within the President's authority under the IEEPA and the Hostage Act. The order does not purport to preclude any claimant from petitioning Congress for relief in connection with his claim, nor could it constitutionally do so.

Provisions of executive order blocking property of the former Shah's estate and that of his close relatives, and requiring all persons subject to the jurisdiction of the United States to submit to the Secretary of the Treasury information about this property to be made available to the government of Iran, are within the President's authority under the IEEPA. Proposed order also directs the Attorney General to assert in appropriate courts that claims of Iran for recovery of this property are not barred by foreign sovereign immunity or act of state doctrines, and asserts that all Iranian decrees relating to the former Shah and his family should be enforced in courts of the United States.

The President has constitutionally and congressionally conferred authority to enter an agreement designating the Iran-United States Claims Tribunal as the sole forum for determination of claims by the United States or its nationals against Iran, and to confer upon the Tribunal jurisdiction over claims against the United States.

January 19, 1981

THE PRESIDENT
THE WHITE HOUSE

MY DEAR MR. PRESIDENT: I have been asked for my opinion concerning the legality of certain actions designed to resolve issues arising from the detention in Iran of 52 American hostages, including the diplomatic and consular staff in Tehran.

An international agreement has been reached with Iran. The agreement, which consists of four separate documents, commits the United States and Iran to take specified steps to free the hostages and to resolve specified claims between the United States and its nationals and Iran and its nationals. These documents embody the interdependent commitments made by the two parties for which Algeria has been acting as intermediary.

The first document is captioned "Declaration of the Government of the Democratic and Popular Republic of Algeria" (Declaration). The Declaration provides, first, for nonintervention by the United States in the internal political and military affairs of Iran.

Second, the Declaration provides generally for return of Iranian assets. The transfer utilizes the Central Bank of Algeria as escrow agent and the Bank of England in London as depositary: their obligations and powers are specified in two other documents, the "Escrow Agreement" and the "Depositary Agreement." Separate timetables and conditions are described for assets in the Federal Reserve Bank of New York (Fed), in foreign branches of United States banks, and in domestic branches of United States banks, and for other financial assets and other property located in the United States and abroad. The transfer of the assets in the Fed and in the foreign branches to the Bank of England is scheduled to take place first. Upon Iran's release of the hostages, the Central Bank of Algeria, as escrow agent, shall direct the Bank of England, under the terms of the Escrow and Depositary Agreements, to disburse the escrow account in accordance with the undertakings of the United States and Iran with respect to the Declaration.

The transfer from the Central Bank of Algeria to Iran of the assets presently in the domestic branches will take place upon Iran's establishment with the Central Bank of Algeria of a Security Account to be used for the purpose of paying claims against Iran in accordance with a Claims Settlement Agreement set forth in the fourth document, which is captioned "Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran" (Claims Settlement Agreement). The Claims Settlement Agreement provides for the establishment of an Iran-United States Claims Tribunal, which will have jurisdiction to decide three categories of claims: (1) claims by United States nationals against Iran and claims by Iranian nationals against the United States, and counterclaims arising out of the same transaction or occurrence, for claims and counterclaims outstanding on the date of the Agreement;[1] (2) official claims of the governments of the United States and Iran against each other arising out of contracts for the purchase and sale of goods and services; and (3) any dispute as to the interpretation or performance of any provision of the Declaration.

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[1] Two categories of claims are specifically excluded: (1) claims relating to the seizure or detention of the hostages, injury to United States property or property within the compound of the embassy in Tehran, and injury to persons or property as a result of actions in the course of the Islamic Revolution in Iran which were not actions of the government of Iran and (2) claims arising under the terms of a binding contract specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts.

Third, the Declaration provides for nullification of trade sanctions against Iran and withdrawal of claims now pending in the International Court of Justice. The United States also agrees not to prosecute its claims and to preclude prosecution by a United States national or in the United States courts of claims arising out of the seizure of the embassy and excluded by the Claims Settlement Agreement.

Fourth, the Declaration provides for actions by the United States designed to help effectuate the return to Iran of the assets of the family of the former Shah.

A series of executive orders has been proposed to carry out the domestic, and some foreign, aspects of the international agreement. It is my opinion that under the Constitution, treaties, and laws of the United States you, your subordinates, the Fed, and the Federal Reserve Board are authorized to take the actions described in the four documents constituting the international agreement and in the executive orders.[3]

I shall first examine the proposed executive orders and consider them as to form and legality. Subsequently I shall consider certain questions which arise from other proposed actions and documents related thereto.

1. The first proposed executive order is captioned "Direction Relating to Establishment of Escrow Accounts." Under it, the Secretary of the Treasury is authorized to direct the establishment of an appropriate escrow agreement with the Bank of England and with the Central Bank of Algeria to provide as necessary for distribution of funds in connection with the release of the hostages. The Escrow Agreement provides, among other things, that certain assets in which Iran has an interest shall be credited by the Bank of England to an escrow account in the name of the Central Bank of Algeria and transferred to Iran after the Central Bank of Algeria receives certification from the Algerian government that the 52 hostages have safely departed from Iran.

The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1706 (Supp. I 1977), provides you with authority, during a declared national emergency, to direct transactions and transfers of property in which a foreign country has an interest under such regulations as you may prescribe. As the proposed order recites, such an emergency has been declared. IEEPA was the authority for the blocking order of November 14, 1979, Executive Order No. 12,170, which asserted control over Iranian government assets. Moreover, the statute known as the Hostage Act, 22 U.S.C. § 1732, authorizes the President, when American citizens are unjustly deprived of liberty by a foreign government, to use such means, not amounting to acts of war, as he may think "necessary and proper" to bring about their release. The phrase "necessary and proper" is, of course, borrowed from the Constitution, and has been construed as providing very broad discretionary powers for legitimate ends. U.S. Const. Art. I, § 8, cl. 18; *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Establishment of the escrow account is directed to the release of the hostages. This order thus falls within your powers under these Acts.[3]

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[3] Documents testifying to the adherence to the agreement by both the United States and Iran will also be executed; these documents present no substantive legal issues.

It is approved as to form and legality.

2. The second proposed executive order is captioned "Direction to Transfer Iranian Government Assets." The Fed is directed to transfer to its account at the Bank of England, and then to the escrow account referred to in paragraph 1, the assets of the government of Iran, as directed by the Secretary of the Treasury. The order also revokes the authorization for, and nullifies all interests in, the frozen Iranian government property except the interests of Iran and its agents. The effect of this order will be to void the rights of plaintiffs in any possible litigation to enforce certain attachments and other prejudgment remedies that were issued against the blocked assets following the original blocking order.

I believe that this provision is lawful for several reasons. I am informed, first, that the Iranian funds on deposit in the Fed are funds of the Bank Markazi, the Central Bank of Iran. As such, they are clearly not subject to attachment. The Foreign Sovereign Immunities Act of 1976 specifically states that the property of a foreign central bank held for its own account shall be immune from attachment and execution unless that immunity has been explicitly waived. 28 U.S.C. § 1611(b). It is my view that there has been no such waiver.

Even assuming, *arguendo*, that the attachments are not precluded by 28 U.S.C. § 1611(b), there is power under IEEPA to nullify them or to prevent the exercise of any right under them. Under IEEPA, the President has authority in time of emergency to prevent the acquisition of interests in foreign property and to nullify new interests that are acquired through ongoing transactions. The original blocking order delegated this power to the Secretary of the Treasury, who promulgated regulations prohibiting the acquisition, through attachment or any other court process, of any new interest in the blocked property. The effect of these regulations was to modify both the substantive and the procedural law governing the availability of prejudgment remedies to creditors of Iran. The regulations contemplated that provisional remedies might be permitted at a later date but provided that any unauthorized remedy would be "null and void." 31 C.F.R. § 535.203(e).

Subsequently, all of the attachments and all of the other court orders against the Iranian assets held by the Fed were entered pursuant to a general license or authorization given by the Secretary of the Treasury effective November 23, 1979. This authorization, like all authorizations issued under the blocking regulations, may be revoked at any time in accordance with 31 C.F.R. § 535.805, which expressly provides that any authorization issued under the blocking order could be "amended, modified, or revoked at any time." *See Orvis* v. *Brownell*, 345 U.S. 183 (1953). The regulations did not purport to authorize any transaction to the extent that it was prohibited by any other law (other than IEEPA), such as the Foreign Sovereign Immunities Act.[4] 31 C.F.R. § 535.101(b).

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[3] Although I do not specifically discuss the applicability of the Hostage Act to the other proposed orders described in this opinion, I believe that it generally supports their issuance.

Upon revocation, the exercise or prosecution of any interests created by the outstanding attachments and other orders will be unauthorized. The orders themselves will no longer confer any enforceable right upon the creditors. Indeed, because IEEPA expressly grants to the President a power of nullification, the interests created by these provisional remedies are themselves subject to nullification, in addition to nullification by the revocation of the underlying authorization. In this respect the President's power under IEEPA is analogous to his constitutional power to enter into international agreements that terminate provisional interests in foreign property acquired through domestic litigation if necessary in the conduct of foreign affairs. *See The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). The nullification of these interests is an appropriate exercise of the President's traditional power to settle international claims. *United States* v. *Pink*, 315 U.S. 203 (1942); *United States* v. *Belmont*, 301 U.S. 325 (1937).

Upon the direction of the Secretary of the Treasury, the Fed will be free to transfer the Iranian assets; the attachments and other prejudgment encumbrances will have been rendered unenforceable by the contemporaneous change in law. Moreover, the Fed may comply with the Secretary's directive without litigating in advance the issue of the Secretary's authority to nullify the provisional interests. IEEPA explicitly states, and the proposed order affirms, that "[n]o person shall be held liable in any court . . . for anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, [IEEPA] or any regulation, instruction, or direction issued under [IEEPA]." 50 U.S.C. § 1702(a)(3). I believe that Congress intended this provision to relieve holders of foreign property, as well as individuals administering or carrying out orders issued pursuant to IEEPA, from any liability for actions taken in good faith in reliance on IEEPA and presidential directives issued under IEEPA. This provision protects not only the Fed and the Federal Reserve Board but Executive Branch officials as well. In my opinion, this provision is valid and effective for that purpose.

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[4] In *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, 502 F. Supp. 120 (S.D.N.Y. 1980), the district court took the position that the freeze order under IEEPA took precedence over the Foreign Sovereign Immunities Act, thus removing Iran's immunity. Assuming, *arguendo*, the correctness of that position, the legal effect of the totality of actions dicussed herein would be to reinstate Iran's immunity, thereby removing the *ratio decedendi* of the district court's decision.

Similarly, the Secretary himself is empowered, in my opinion, to nullify these provisional interests and to license the transfer of the assets without submitting the issue to litigation and without insisting that the Fed refuse any transfer until all objections to the transfer have been definitively rejected by the courts. As noted, the interests, if any, created by these prejudgment remedies were created upon the condition that the authority for the underlying transactions might be revoked "at any time"; and that condition may be invoked without delay. The powers that the Constitution gives and the Congress has given the President to resolve this kind of crisis could be rendered totally ineffective if they could not be exercised expeditiously to meet opportunities as they arise. The primary implication of an emergency power is that it should be effective to deal with a national emergency successfully. *United States* v. *Yoshida International, Inc.*, 526 F.2d 560, 573 (C.C.P.A. 1975).

Moreover, the Fed may transfer the assets before the outstanding court orders have been formally vacated. When a supervening legislative act expressly authorizes a course of conduct forbidden by an outstanding judicial order, the new legislation need not require the persons subject to it to submit the matter to litigation before pursuing the newly authorized course. *See Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855). I believe that this case is closely on point. A valid executive order has the force of a federal statute, superseding state actions to the extent that it is inconsistent. *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 166 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). Thus, the holding of the *Wheeling* case applies here.

The order is approved as to form and legality, and actions taken consistent with and pursuant to it will be lawful and valid.

3. The third proposed executive order is captioned "Direction to Transfer Iranian Government Assets Overseas." In general, it directs branches of United States banks outside the country to transfer Iranian government funds and property to the account of the Fed in the Bank of England. The transfer is to include interest at commercially reasonable rates from the date of the blocking order. The Secretary of the Treasury shall determine when the transfers shall take place. Any banking institution that executed a set-off against Iranian funds after entry of the blocking order is directed to cancel the set-off and to transfer the funds in the same manner as the other overseas deposits.

The Iranian funds in the branches of American banks overseas were subject to the November 1979 blocking order. Subsequently, the Secretary of the Treasury licensed foreign branches and subsidiaries of American banks to set off their claims against Iran or Iranian entities by debit to the blocked accounts held by them for Iran or Iranian entities. 31 C.F.R. § 535.902. As a result of this license, American banks with branches overseas set off various debts owing to them by Iran and Iranian entities. I understand that most of the debts were loans originally made from offices in the United States and that most of the overseas deposits were in branches located in the United Kingdom. The banks with overseas Iranian accounts set off amounts owing not only to them directly but to other banks with whom they were participants in syndicated loans. The banks have acted on the assumption that any loan made to Iran or an Iranian entity could be set off against any account of Iran or an Iranian entity or enterpise on the theory that, as a result of the control of the Iranian economy by the government of Iran and nationalization of private enterprises, all such entities and enterprises were the same party for purpose of setting off debts. In addition, the banks accelerated the amounts due on loans that were in default, and, under the doctrine of anticipatory breach, set off loans that had not come due.

The blocking order delegated to the Secretary of the Treasury the authority to license the set-offs to the extent that the executive order prevented them. The license did not, however, determine whether the set-offs were valid under any other law. 31 C.F.R. § 535.101(b). I understand that Iran and its entities are contesting in litigation overseas whether the set-offs are lawful. The issues include the proper situs of the debts, identity of the parties, the propriety of acceleration, and the anticipation of breach.

IEEPA authorizes the President, under such regulations as he may prescribe, to nullify and void *transactions* involving property in which a foreign country has an interest and to nullify and void any *right* respecting property in which a foreign country has an interest. 50 U.S.C. § 1702. Either analysis is appropriate here: Iran had an interest in the original set-off transaction and continues to have an interest both in the amounts in the accounts which have and have not been set off. The latter, as noted, are the subject of litigation abroad. *See* 31 C.F.R. §§ 535.311–312. *Cf. Behring International* v. *Miller,* 504 F. Supp. 552 (D.N.J. 1980) (holding that Iran continues to have interest in a trust account created to pay debt). The very use of the words "nullify" and "void" persuades me that Congress intended to authorize the President to set aside preexisting transactions.[5]

As noted, the order also requires the overseas banks, when transferring the Iranian assets, to include interest on those assets from November 14, 1979, at commercially reasonable rates. I understand that in most cases the accounts in overseas branches of American banks are interest-bearing. To the extent that they are not, such interest represents the benefit realized by the banks from holding the blocked Iranian assets which, under the law of restitution, should accrue to the owners of the assets. *Cf. Phillips Petroleum Co.* v. *Adams,* 513 F.2d 355 (5th Cir.), *cert. denied,* 423 U.S. 930 (1975). As such, the interest or benefit realized by the banks is property in which Iran has an interest.[6]

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[5] I believe that the present case is distinguishable in several respects from that in *Brownell* v. *National City Bank,* 131 F. Supp. 60 (S.D.N.Y. 1955). There, the district court concluded that the mere revocation of a license did not serve to void a preexisting and apparently uncontested set-off; the bank, moreover, had no opportunity to recoup its potential loss by bringing the loan current.

For these reasons, I believe that you are thus authorized under IEEPA to compel the transfer of both principal and interest to the Federal Reserve account at the Bank of England as provided by the order and to nullify or prevent the exercise of any interests in this property by anyone other than Iran. I also believe, as discussed in paragraph 2 above, that 50 U.S.C. § 1702(a)(3) relieves from liability anyone taking action in good faith under this executive order.[7]

The proposed order is approved as to form and legality, any actions taken consistent with and pursuant to it will be lawful and valid.

4. The fourth proposed executive order is captioned "Direction to Transfer Iranian Government Assets Held by Domestic Banks." The proposed order directs American banks in the United States with Iranian deposits to transfer them, including interest from the date of blocking at commercially reasonable rates, to the Fed, which will hold the funds subject to the direction of the Secretary of the Treasury.

As discussed in paragraphs 2 and 3, the President has power under IEEPA to direct the transfer of funds of Iran, including interest, and to nullify or prevent the exercise of any interests of anyone other than Iran in Iranian property. Actions taken in good faith pursuant to this order will be, as discussed above, immune from liability.

The order is approved as to form and legality, and actions taken consistent with and pursuant to it will be lawful and valid.

5. The fifth proposed executive order is captioned "Direction to Transfer Iranian Government Financial Assets Held by Non-Banking Institutions." This order is similar to the order described in paragraph 4 except that it requires the transfer to the Fed of funds and securities held by non-banking institutions. The President has the power to direct the transfer of funds and securities of Iran held by non-banking institutions, and actions taken in good faith pursuant to this order shall likewise enjoy the immunity from liability as reflected in 50 U.S.C. § 1702(a)(3).

The proposed order is approved as to form and legality, and actions taken consistent with and pursuant to it will be lawful and valid.

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[6] *See also* Art. VII(2)(b) of the Treaty of Amity, Economic Relations, and Consular Rights Aug. 15, 1955, United States-Iran, 8 U.S.T. 901, 905, T.I.A.S. No. 3853.

[7] *Cf. Cities Service Co.* v. *McGrath,* 342 U.S. 330, 334–36 (1952). It is my opinion that a person who has taken action in compliance with this executive order and is subsequently finally required by any court to pay amounts with respect to funds transferred pursuant to this executive order will have the right as a matter of due process to recover such amount from the United States to the extent of any double liability.

6. The sixth proposed executive order is captioned "Direction to Transfer Certain Iranian Government Assets." The order would require anyone in possession or control of property owned by Iran, not including funds and securities, to transfer the property as directed by the Iranian government. The order recites that it does not relieve persons subject to it from existing legal requirements other than those based on IEEPA. It does, however, nullify outstanding attachments and court orders in the same manner as does the order discussed in paragraph 2.

For the reasons discussed in the preceding paragraphs, the President has power under IEEPA to order the transfer of property owned by Iran as directed by Iran and to nullify outstanding attachments and court orders related to such property. Actions taken in good faith pursuant to this order shall likewise enjoy the immunity from liability as reflected in 50 U.S.C. § 1702(a)(3).

The order is approved as tc form and legality, and actions taken consistent with and pursuant to it will be lawful and valid.

7. The seventh proposed executive order is captioned "Revocation of Prohibitions against Transactions Involving Iran." It revokes the prohibitions of Executive Order No. 12,205 of April 7, 1980; Executive Order No. 12,211 of April 17, 1980; and Proclamation 4702 of November 12, 1979. The two executive orders limited trade with and travel to Iran. The proclamation restricted oil imports from Iran. It is my understanding that although the prohibitions are revoked, the underlying declarations of emergency remain in effect.

The order is approved as to form and legality.

8. The eighth proposed executive order is captioned "Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere." The order directs the Secretary of the Treasury to promulgate regulations prohibiting persons subject to United States jurisdiction from prosecuting in any court or elsewhere any claim against Iran arising from the hostage seizure on November 4, 1979, and the occupation of the embassy in Tehran, and also terminating any previously instituted judicial proceedings based upon such claims.

The President has the power under IEEPA and the Hostage Act to take steps in aid of his constitutional authority[8] to settle claims of the United States or its nationals against a foreign government.[9] Thus, he has the right to license litigation involving property in which a foreign national has an interest, as described in paragraph 2. That license can be suspended by the Executive acting alone. *New England Merchants National Bank* v. *Iran Power Generation and Transmission Co.*, 508 F. Supp. 47 (S.D.N.Y., 1980) (Duffy, J.). *But see National Airmotive Corp.* v.

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[8] *See, e.g.*, Restatement (Second) of Foreign Relations Law of the United States § 213 (1965).

[9] IEEPA was drafted and enacted with the explicit recognition that the blocking of assets could be directly related to a later claims settlement. H. R. Rep. No. 459, 95th Cong., 1st Sess. 17 (1977); S. Rep. No. 466, 95th Cong., 1st Sess. 6 (1977). *See* 50 U.S.C. § 1706(a)(1) (authorizing continuation of controls, after the emergency has ended, where necessary for claims settlement purposes).

Government and State of Iran, 499 F. Supp. 401 (D.D.C., 1980) (Greene, J.).[10]

The order is approved as to form and legality.

9. The final proposed executive order is captioned "Restrictions on the Transfer of Property of the Former Shah of Iran." It invokes the blocking powers of IEEPA to prevent transfer of property located in the United States and controlled by the Shah's estate or by any close relative until litigation surrounding the estate is terminated. The order also invokes the reporting provisions of IEEPA, 50 U.S.C. § 1702(a)(2), to require all persons subject to the jurisdiction of the United States to submit to the Secretary of the Treasury information about this property to be made available to the government of Iran. The property involved is property in which "[a] foreign country or a national thereof" has an interest. Restrictions on transfer and reporting requirements therefore fall within the authority provided by IEEPA.

The order would further direct me, as Attorney General, to assert in appropriate courts that claims of Iran for recovery of this property are not barred by principles of sovereign immunity or the act of state doctrine. I have previously communicated to you and to the Department of State my view to this effect (based on advice furnished to me by the Office of Legal Counsel and the Civil Division of this Department) and will so assert in appropriate proceedings. The proposed order also recites that it is the position of the United States that all Iranian decrees relating to the assets of the former Shah and his family should be enforced in our courts in accordance with United States law.

The proposed order is approved as to form and legality.

10. The other questions relate to the Claims Settlement Agreement. I conclude that you have the authority to enter an agreement designating the Iran-United States Claims Tribunal as the sole forum for determination of claims by United States nationals or by the United States itself against Iran and to confer upon the Tribunal jurisdiction over claims against the United States, including both official contract claims and disputes arising under the Declaration.

The authority to agree to the establishment of the Tribunal as an initial matter cannot be challenged. The Claims Settlement Agreement falls squarely within powers granted to the Executive by the Constitution, by treaty, and by statute.

As a step in the reestablishment of diplomatic relations with Iran, the Claims Settlement Agreement represents an appropriate exercise of the President's powers under Article II of the Constitution to conduct foreign relations. Moreover, by Article XXI(2) of the 1957 Treaty with

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[10] I note that the issue of appropriate compensation for the hostages will be considered by a Commission on Hostage Compensation established by separate executive order. Moreover, this eighth order does not, of course, purport to preclude any claimant from presenting his claim to Congress and petitioning for relief; nor could it constitutionally do so.

Iran, the Senate gave its agreement for the two nations to settle disputes as to the interpretation or application of the treaty by submission to the International Court of Justice or by any "pacific means."[11] Arbitration by the Iran-United States Claims Tribunal is a pacific means of dispute settlement. Finally, by the Hostage Act, 22 U.S.C. § 1732, Congress has conferred upon the President specific statutory powers applicable to this crisis. The agreement to resolve by arbitration the disputes now obstructing the release of the hostages is a proper exercise of this power.

I note in conclusion the congruence of your constitutional powers and the congressionally conferred authority. In this situation, of course, your authority is at its maximum. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring).

The specific jurisdiction conferred upon the Tribunal must be further examined. The first category of claims, the private claims based on debts, contracts, expropriations, or other measures affecting property rights, includes both claims by United States nationals against Iran and claims by Iranian nationals against the United States. The former are referrable to the Tribunal under the constitutional authority to settle claims recognized in *United States* v. *Pink,* 315 U.S. 203 (1942), and *United States* v. *Belmont,* 301 U.S. 324 (1937). *See also* Restatement (Second) of Foreign Relations Law of the United States § 213 (1965).[12]

From these claims are excluded claims arising out of the seizure of the embassy and claims on binding contracts providing for dispute resolution solely by Iranian courts. Again, the power to settle claims includes the power to exclude certain claims from the settlement process. *Cf. Aris Gloves, Inc.* v. *United States,* 420 F.2d 1386 (Ct. Cl. 1970). Moreover, the exclusion is not intended to be a final settlement or determination of these claims. I understand that the claims based on the seizure will be given separate consideration, *see* note 10 *supra.* I note also that the exclusion of the claims on binding contracts that provide the exclusive procedure for dispute resolution does not adversely affect any option that these claimants would have had prior to the hostage crisis and all the actions taken in response to it. These claimants are not disadvantaged by the Claims Settlement Agreement; as to them, the status quo as of the time that the hostages were taken is merely preserved.

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[11] Art. XXI(2) provides:

> Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

Because the Treaty provides for peace and friendship between the two nations, trade and commercial freedom, protection and security of nationals, prompt and just compensation for the taking of property, and the absence of restrictions on the transfer of funds, the disputes to be referred to the Tribunal are disputes "as to the interpretation or application of the . . . Treaty."

[12] Here again, your constitutional powers are supplemented by statute. *See* note 9, *supra.*

The latter claims in the first category, the claims by Iranian nationals against the United States, and also the official claims in the second category by Iran against the United States, are referrable to the Tribunal for adjudication under the same authority. The President's power to refer these claims to binding arbitration as part of an overall settlement of our disputes with Iran is within the authority conferred on him by the Treaty and the Hostage Act and is also within his sole authority under Article II of the Constitution. Any award made by the Tribunal against the United States would create an obligation under international law. Such obligations have invariably been honored by the Congress in our constitutional system.

The remainder of the claims in this second category are official claims of the United States against Iran. The submission of the claims to the Tribunal is a matter for the Executive's sole determination in the conduct of foreign relations.

Finally, jurisdiction over the third category of claims, consisting of disputes as to the interpretation or performance of the Declaration, is appropriately conferred upon the Tribunal incident to the exercise of the power to agree to the Declaration in the first instance.

For these reasons, I conclude that the United States may enter into the international agreement and that you have legal authority to issue all of these documents and executive orders.

Respectfully,

BENJAMIN R. CIVILETTI

The Attorney General's Duty to Defend the Constitutionality of Statutes

The Department of Justice has a duty to defend the constitutionality of an Act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General concludes that the argument may ultimately be unsuccessful in the courts. The statute at issue in the instant case could be held constitutional as applied in certain situations, and accordingly the Department will defend it.

April 6, 1981

HONORABLE STROM THURMOND
CHAIRMAN
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
WASHINGTON, D.C. 20510

HONORABLE JOSEPH R. BIDEN, JR.
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
WASHINGTON, D.C. 20510

DEAR MR. CHAIRMAN AND SENATOR BIDEN: I am pleased to respond to your letter of February 3, 1981, requesting that I reconsider the decision of the Department of Justice not to defend the constitutionality of 47 U.S.C. § 399(a) in the case of *League of Women Voters* v. *FCC*, No. 80-5333 (9th Circuit).* Please forgive the delay in responding, but we have undertaken a thorough review of the question. I have determined that the Department will participate in the litigation and defend the statute.

The Department appropriately refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid. In my view, the Department has the duty to defend an act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts.

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*NOTE: The Department of Justice's decision not to defend the constitutionality of § 399 had been conveyed to Congress in an October 11, 1979, letter from Attorney General Civiletti to Senate Majority Leader Byrd. Ed.

The prior decision not to defend § 399(a) was made by virtue of the conclusion that no reasonable defense of the constitutionality of this provision as a whole could be made. Under applicable Supreme Court precedent, however, even a statute that could have some impermissible applications will not be declared unconstitutional as a whole unless the provision is substantially overbroad and no limiting construction of the language of the statute is possible. Here, for example, the statute's application to political endorsements by government-owned broadcasters might well be held by a court to be constitutional. In that event, the fact that the statute permissibly could be applied in some instances may be sufficient to preclude a finding that the provision as a whole is unconstitutional.

Accordingly, we will advise the Ninth Circuit of our position and request that the case be remanded to the district court to allow us to present our defense.**

Sincerely,
WILLIAM FRENCH SMITH

**NOTE: Pursuant to the government's request, the case was remanded by the court of appeals to the district court, whose judgment, holding § 399's ban on editorializing by noncommerical stations unconstitutional, was ultimately affirmed by the Supreme Court. *FCC* v. *League of Women Voters of California*, —— U.S. ——, 104 S. Ct. 3106 (1984), *aff'g* 547 F. Supp. 379 (C.D. Cal. 1982). Section 399's separate ban on political endorsements by noncommercial stations was by then no longer at issue in the case, and the Supreme Court "express[ed] no view" on the constitutionality of that provision. 104 S. Ct. at 3113, n. 9. Ed.

Assertion of Executive Privilege in Response to a Congressional Subpoena

Executive privilege can and should be asserted to withhold deliberative, predecisional documents from Congress, where release of the documents would seriously impair the deliberative process and the conduct of foreign policy, and where Congress' only stated interest in obtaining the documents is for general oversight purposes.

Where Congress has a legitimate need for information that will help it legislate, and the Executive Branch has a legitimate constitutionally recognized need to keep information confidential, each branch has an obligation to make a principled effort to accommodate the needs of the other.

October 13, 1981

THE PRESIDENT
THE WHITE HOUSE

DEAR MR. PRESIDENT: You have requested my advice concerning the propriety of an assertion of executive privilege in response to a subpoena issued by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce (Subcommittee). The subpoena was issued on September 28, 1981, and served on the Department of the Interior on October 2, 1981.* It demands the production of certain documents by October 14, 1981. It seeks "[a]ll documents relative to the determination of reciprocity under the Mineral Lands Leasing Act, 30 U.S.C. § 181, including documents relating to the general matter of reciprocity and the specific question of the status of Canada, utilized or written by officials and staff of the Department of Interior on or before September 18, 1981." [1] The Office of Legal Counsel of the Department of Justice has examined documents embraced by the subpoena and identified by the Department of the Interior as being potentially subject to a claim of executive privilege, and has concluded that a proper claim of privilege may be asserted with respect to all of the documents identified in the attachment hereto. I concur in that conclusion. I believe that the documents identified are properly subject to a claim of executive privilege and that the privilege should be asserted with respect to those documents.

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*NOTE: The full text of the subpoena and related correspondence can be found in *Contempt of Congress: Hearings on the Congressional Proceedings Against Interior Secretary James G. Watt Before the Subcommittee on Oversight and Investigation of the House Committee on Energy and Commerce*, 97th Cong., 2d Sess. (1982). Ed.

[1] The Mineral Lands Leasing Act (Act) provides, in pertinent part, that "citizens of another country, the laws, customs or regulations of which deny similar or like privileges to citizens of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act." 30 U.S.C. § 181.

I.

I understand that on September 24, 1981, the Department of the Interior supplied the Subcommittee with a large number of the materials presently demanded by the subpoena, including a list of 36 published sources and copies of 143 documents. Once the subpoena was issued, the Department of the Interior, in consultation with other departments having an interest in the matter, including the Departments of State, Commerce, Treasury, Justice, and the Offices of the United States Trade Representative and the White House Counsel, once again reviewed the documents which had not previously been provided to the Subcommittee. In an effort to make every reasonable accommodation to the legitimate needs of the Legislative Branch, the Department of the Interior released an additional 31 documents to the Subcommittee on October 9, 1981. One document was shown to the Subcommittee staff at that time but was not released. In addition, the Subcommittee was provided with a written list and oral description of the 31 documents which had been withheld. The Subcommittee staff was permitted to ask questions concerning the nature of those documents, a procedure designed to provide the Subcommittee with enough information to assure itself that the documents are not essential to the conduct of the Subcommittee's legislative business. Finally, the Subcommittee was informed that an additional 5–10 documents would be released once the Department of the Interior had concluded its deliberations regarding the status of Canada under the Act.

All of the documents in issue are either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations. Several of the documents reflect views of officials of the Canadian government transmitted in confidence to United States officials as well as statements regarding the status of Canada by officials of the Department of State. Other documents, prepared for the Cabinet Council on Economic Affairs and the Cabinet-level Trade Policy Committee, are predecisional, deliberative memoranda which have been considered by officials at the highest levels of government. Both the Cabinet Council and the Trade Policy Committee prepare recommendations for presidential action; in addition, you personally attend some Cabinet Council meetings and chair these meetings when you do attend. Finally, a large portion of the documents being withheld reflect internal deliberations within the Department of the Interior regarding the status of Canada under the Act. Some of these documents are staff level advice to policymakers containing recommendations regarding decisions which have not yet become final. Others contain internal Interior Department deliberations regarding its participation in the Trade Policy Staff Committee and the Cabinet Council on Economic Affairs. Still other documents reflect tentative legal judgments regarding questions arising under the Act. In addition, the subpoena encompasses preliminary drafts of congressional testimony by the Secretary of the Interior. These latter documents, although generated at levels below that of the Cabinet and subcabinet, are of a highly deliberative nature and involve an ongoing decisional process of considerable sensitivity.

II.

The Office of Legal Counsel of the Department of Justice has examined each of these documents and has concluded that they may properly be withheld from the Congress at this time. These documents are quintessentially deliberative, predecisional materials. Each of the agencies which generated the documents has stated that their release to the Subcommittee would seriously interfere with or impede the deliberative process of government and, in some cases, the Nation's conduct of its foreign policy. Because the policy options considered in many of these documents are still under review in the Executive Branch, disclosure to the Subcommittee at the present time could distort that decisional process by causing the Executive Branch officials to modify policy positions they would otherwise espouse because of actual, threatened, or anticipated congressional reaction. Moreover, even if the decision at issue had already been made, disclosure to Congress could still deter the candor of future Executive Branch deliberations, because officials at all levels would know that they could someday be called by Congress to account for the tentative policy judgments which they had earlier advanced in the councils of the Executive Branch. As the Supreme Court has noted, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *United States* v. *Nixon,* 418 U.S. 683, 705 (1974). You must have access to complete and candid advice in order to provide the soundest basis for presidential decisions. I have concluded that release of these documents would seriously impair the deliberative process and the conduct of foreign policy. There is, therefore, a strong public interest in withholding the documents from congressional scrutiny at this time.

Against this strong public interest I must consider the interest of Congress in obtaining these documents. The Subcommittee, in its letter to Secretary Watt of August 13, 1981, stated that it was conducting a "legislative oversight inquiry" into the impact of Canadian energy policies upon American companies. The Subcommittee's next formal communication to Secretary Watt, the subpoena issued on September 28 and served October 2, did not further explain the Subcommittee's need for the information. I therefore presume that the Subcommittee's interest in obtaining these documents is one of legislative oversight.[2]

Congress does have a legitimate interest in obtaining information to assist it in enacting, amending, or repealing legislation. This interest extends beyond information bearing on specific proposals for legislation; it includes, as well, the congressional "oversight" function of being informed regarding the manner in which the Executive Branch is executing the laws which Congress has passed. Such oversight enables the Legislative Branch to identify at an early stage shortcomings or problems in the execution of the law which can be remedied through legislation.

While I recognize the legitimacy of the congressional interest in the present case, it is important to stress two points concerning that interest. First, the interest of Congress in obtaining information for oversight purposes is, I believe, considerably weaker than its interest when specific legislative proposals are in question. At the stage of oversight, the congressional interest is a generalized one of ensuring that the laws are well and faithfully executed and of proposing remedial legislation if they are not. The information requested is usually broad in scope and the reasons for the request correspondingly general and vague. In contrast, when Congress is examining specific proposals for legislation, the information which Congress needs to enable it to legislate effectively is usually quite narrow in scope and the reasons for obtaining that information correspondingly specific. A specific, articulated need for information will weigh substantially more heavily in the constitutional balancing than a generalized interest in obtaining information. *See United States* v. *Nixon, supra; Senate Select Committee on Presidential Campaign Activities* v. *Nixon,* 498 F.2d 725, 731–33 (D.C. Cir. 1974) (*en banc*).

Second, the congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances. It is important to stress that congressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws. When such "oversight" is used as a means of participating directly in an ongoing process of decisionmaking within the Executive Branch, it oversteps the bounds of the proper legislative function. Restricted to its proper sphere, the congressional oversight function can almost always be properly conducted with reference to information concerning decisions which the Executive Branch has already reached. Congress will have a legitimate need to know the preliminary positions taken by Executive Branch officials during internal deliberations only in the rarest of circumstances. Congressional demands, under the guise of oversight, for such preliminary positions and deliberative statements raise at least the possibility that the Congress has begun to go beyond the legitimate oversight function and has impermissibly intruded on the Executive Branch's function of executing the law. At the same time, the interference with the President's ability to execute the law is greatest while the decisionmaking process is ongoing.

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[2] The House Committee on Energy and Commerce does have pending before it several bills, H.R. 4033, H.R. 4145, and H.R. 4186, which would amend the Act in certain respects. The pendency of these bills has not been formally asserted as a reason for obtaining the documents. Moreover, the documents requested appear to have a tangential relevance at best to the subject matter of the bill.

Applying the balancing process required by the Supreme Court, it is my view that the Executive Branch's interests in safeguarding the integrity of its deliberative processes and its conduct of the Nation's foreign policy outweigh the stated interest of the Subcommittee in obtaining this information for oversight purposes. It is, therefore, my view that these documents may properly be withheld from the Subcommittee at the present time.

III.

Finally, a brief word is in order concerning the negotiations between the Department of the Interior and the Subcommittee during this dispute. In cases in which the Congress has a legitimate need for information that will help it legislate and the Executive Branch has a legitimate, constitutionally recognized need to keep information confidential, the courts have referred to the obligation of each branch to accommodate the legitimate needs of the other. *See United States* v. *American Tel. & Tel. Co.,* 567 F.2d 121, 127, 130 (D.C. Cir. 1977); *see generally United States* v. *Nixon, supra.* The accommodation required is not simply an exchange of concessions or a test of political strength. It is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch.

It is my view that the Executive Branch has made such a principled effort at accommodation in the present case. Prior to the issuance of the subpoena, the Department of the Interior supplied the Subcommittee with a large number of the documents subsequently requested by the subpoena. In response to the subpoena, the interested Executive Branch departments reviewed those documents which had been withheld and identified documents that could be supplied in an effort to further accommodate the Subcommittee's needs. Substantial additional materials were released to the Subcommittee on October 9, 1981, despite the fact that at least some of these materials were deliberative in nature and therefore presumptively subject to a claim of privilege. Moreover, the Department of the Interior has promised to release additional material once its deliberations regarding the status of Canada under the Act are completed. Finally, members of the Subcommittee staff were provided a comprehensive list of the materials being withheld from disclosure, and were briefed orally by the various federal agencies regarding the nature of those documents.

In contrast, the Subcommittee has not to date shown itself sensitive to the legitimate needs of the Executive Branch. As noted, it has never formally stated its need for the materials beyond a generalized interest in "oversight." It responded to the submission of documents by the Executive Branch on September 24 by issuing a subpoena four days later—a subpoena which was broader in scope than the Subcommittee's original August 13 request. To date, the Subcommittee has shown little interest in accommodating legitimate interests of the Executive Branch in safeguarding the privacy of its deliberative processes and conducting the Nation's foreign policy. This lack of accommodation on the Subcommittee's part lends further support to my conclusion that the documents in question may properly be withheld.

In conclusion, it is my opinion that the documents now being withheld are well within the scope of executive privilege. The process by which the President makes executive decisions and conducts foreign policy would be irreparably impaired by production of these documents at this time. I recommend that executive privilege be asserted.

Sincerely,

WILLIAM FRENCH SMITH

MEMORANDUM OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

January 9, 1981, through December 24, 1981

United States Attorney's Representation of Private Insurance Company in Civil Litigation

It is not improper for the Department of Justice to admit the liability of the United States on an indemnity claim in civil litigation, even if the Department previously refused to enter into a "hold harmless" agreement with the party seeking indemnity.

Representation arrangement, whereby the United States Attorney will appear as counsel both for a private insurance group and for the United States in the same civil litigation, creates no ethical difficulty, given the coincidence of both parties' interests and their consent.

January 9, 1981

MEMORANDUM OPINION FOR THE UNITED STATES ATTORNEY, EASTERN DISTRICT OF NEW YORK

You have requested the views of this Office on two questions that have arisen in connection with civil litigation in the Eastern District involving the New Hampshire Insurance Group (NHIG). The facts, as we understand them, are as follows: NHIG has been sued on a performance bond or bonds that were written by a bonding agent who was working undercover for the Federal Bureau of Investigation (FBI). NHIG was originally represented in the litigation by private counsel, but your office has recently assumed the defense under a representation agreement that was developed with the approval of the Associate Attorney General. While represented by private counsel, NHIG filed a third-party complaint against the United States seeking indemnity for any losses that it might sustain in the litigation. The Torts Branch of the Civil Division has now proposed that your office answer the third-party complaint on behalf of the United States, and it has suggested that the complaint be answered in a way that would effectively admit the liability or potential liability of the United States on the indemnity claim.

Your questions are the following: First, inasmuch as the Department has previously declined to enter into an explicit "hold harmless" agreement with NHIG regarding these bonds, is it proper for the Department to admit that the United States is or may be liable to NHIG on the indemnity claim? Second, is it proper from a representational standpoint for your office to appear as counsel both for NHIG and for the United States?

We have discussed these questions with the Deputy Associate Attorney General and Director of the Torts Branch. Our views are set forth below.

There is no law, regulation, or departmental policy that prevents the Department from admitting the liability of the United States in a civil case, if the United States is indeed liable, given the facts and the applicable law. If the dealings among the FBI, the undercover agent, and NHIG give NHIG a statutory cause of action for damages against the United States, it is proper for the Department to admit the liability of the United States. The unwillingness of the Department to enter into an express "hold harmless" agreement with NHIG resulted not from a rule against admitting accrued liability, but from a belief that the Department lacked, or may have lacked, the authority to create a new, purely contractual obligation to hold NHIG harmless. For reasons we need not explore, the Comptroller General has suggested that the Antideficiency Act prevents executive officers from entering into certain kinds of indemnity agreements, and there is uncertainty in any case about the authority of the Department to pay from general departmental appropriations certain private claims arising from the conduct of departmental investigators and agents. These technical fiscal constraints do not prevent the Department from acknowledging the validity of well-founded claims asserted against the United States in civil litigation; nor do they prevent the due payment of such claims from the judgment fund.

As regards the representation question, we have two observations. First, the Department has agreed to defend NHIG in the main action; it has not agreed to prosecute NHIG's claim against the United States. There would be grave doubt about our authority to do the latter, but it is clear that a defense of NHIG will advance the interests of the United States, given our contingent liability for the losses NHIG may sustain. In other words, there is a coincidence of interests between NHIG and the United States in the main action. This brings us to the second point. Because of the coincidence of interests, and because both parties have consented to the representation arrangement, we think that the dual appearance of government counsel in this case, to defend NHIG on the one hand and to admit the liability of the government on the other, creates no ethical difficulty, at least at this stage. This is an unusual case, but we think the representation arrangement is proper.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

Validity of Federal Tax Lien on Civil Service Retirement Refund

Under 5 U.S.C. § 8346(a), the Internal Revenue Service is barred from attaching the civil service retirement refund of a former federal employee in order to satisfy her husband's tax liability, notwithstanding any interest the latter individual may have in the refund under Nevada's community property law.

January 13, 1981

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, OFFICE OF PERSONNEL MANAGEMENT

This responds to your request for an opinion on the validity of a levy of the Internal Revenue Service (IRS) directed to half the civil service retirement deductions due for refund to Mrs. D, a former federal employee. The levy was occasioned by the individual tax liability of Mrs. D's husband, with whom she resides in Nevada, a community property state.

The statute relating to civil service retirement benefits that is principally relevant here provides as follows:

> The money mentioned by this subchapter [Subchapter III—Civil Service Retirement, consisting of 5 U.S.C. §§ 8331-8348] is not assignable, either in law or equity, *except under the provisions of subsections (h) and (j) of section 8345 of this title,* or subject to execution, levy, attachment, garnishment, or other legal process, *except as otherwise may be provided by Federal laws.*

5 U.S.C. § 8346(a) (emphasis added). Subsection (h) of § 8345 permits an individual entitled to an annuity to make allotments or assignments of amounts therefrom for such purposes as the Office of Personnel Management (OPM) considers appropriate. Subsection (j), among other things, requires that funds which are otherwise payable by OPM to an individual under the retirement laws shall be paid instead to another person if so provided in a "court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to" such a decree. Subsection (j) encom-

passes court-ordered divisions of assets under state community property laws.

The provision of the IRS Code that is principally relevant here is 26 U.S.C. § 6331(a), which reads in pertinent part:

> If any person liable to pay any tax neglects or refuses to pay the same . . . it shall be lawful for the Secretary [of the Treasury] to collect such tax . . . by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person . . . .

Section 6334 does not exempt any payments made under the civil service retirement laws.

The issue in dispute between OPM and IRS is whether the second "except" clause of 5 U.S.C. § 8346(a) has the effect of bringing Nevada's community property law into play with regard to the retirement deductions accumulated by OPM for Mrs. D's account. If so, IRS may reach 50 percent of the funds in the account as Mr. D's "property [or] rights to property" under 26 U.S.C. § 6331(a).

Before dealing specifically with this issue, it will be helpful to trace the history of 5 U.S.C. § 8346(a) and other statutory provisions that may impinge on an individual's civil service retirement benefits. The original progenitor of § 8346(a) was § 14 of the legislation enacted in 1920 to create the retirement system, Pub. L. No. 66-215, 41 Stat. 614, 620. Section 14 did not contain the italicized language of § 8346(a), *supra*, but read simply as follows:

> That none of the moneys mentioned in this Act shall be assignable, either in law or equity, or subject to execution, levy, or attachment, garnishment, or other legal process.

This wording remained essentially unchanged until late 1975. However, before then Congress had provided in other statutes for the government's deductions of health insurance premiums (5 U.S.C. § 8906(c)), life insurance premiums (5 U.S.C. § 8714a(d)), and medicare premiums (42 U.S.C. § 1395s(d)) from an individual's retirement annuity. In addition, Congress had enacted § 459 of the Social Security Act, 42 U.S.C. § 659, effective January 1, 1975, which lifted the bar of § 8346(a) and similar provisions in other federal benefit laws for the purpose of allowing garnishment of benefits to satisfy an obligation for child support or alimony.[1]

The first amendment to 5 U.S.C. § 8346(a) was made by Pub. L. No. 94-166, 89 Stat. 1002 (1975). It added subsection (h) to § 8345 to permit allotments and assignments by annuitants and correspondingly amended

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[1] Two years later Congress defined "alimony" so as not to include a payment in compliance with a community property settlement—that is, Congress specifically ruled out garnishments to enforce such settlements. 42 U.S.C. § 662(c) (Supp. I 1977).

§ 8346(a) to introduce the first "except" clause, as it pertains to subsection (h).[2] It also added the second "except" clause.

Finally, in 1978, Congress enacted 5 U.S.C. § 8345(j) to allow OPM to comply with a decree, order, or property settlement (including one based on a state's community property law) that arose from a divorce, annulment, or legal separation.[3] Pub. L. No. 95-366, 92 Stat. 600, § 1(a)(1978). Section 8346(a) was amended accordingly by the addition of the italicized reference to § 8345(j) in the first "except" clause of § 8346(a). *Id.*, § 1(b).

Turning to the issue before us, we note first that there is nothing in the legislative history of the amendment of § 8346(a) in 1975 to indicate the reason for adding the words, "except as otherwise may be provided by Federal laws," at its end. In fact, this language was not necessary to achieve the avowed purpose of the 1975 Act—that is, the authorization of allotments and assignments by annuitants.[4] That purpose was realized by the enactment of § 8345(g) and the first "except" clause. Moreover, the second "except" clause was not necessary for the effectiveness of any of the earlier laws listed above because each was self-contained, and it was not necessary to enable IRS to reach funds payable under the retirement law to employees or former employees delinquent in the payment of their taxes.[5] The most that can be said about the provision is that it was probably included *pro forma.*

Passing the question of purpose for the moment, we find that there was also silence in Congress concerning the meaning of the term "Federal laws" in the second "except" clause. We are faced in this context with a significant lack of assistance because we must determine whether the term covers 26 U.S.C. § 6331(a) as read together with the community property law of a state. If not, IRS cannot take half of Mrs. D's retirement deductions to reduce her husband's indebtedness to the government.

We are of the opinion on this point that in the absence of congressional guidance regarding either the purpose of the second "except" clause or, more importantly, the scope of the term "Federal laws," the term must be read in its natural sense of embracing only federal statutory laws.[6] More particularly, we are unable to find either a precedent or a basis for construing the term to encompass a state's community property law by transmutation through the medium of 26 U.S.C. 6331(a). In short, we conclude that Nevada's community property law, in the absence of explicit legislation by Congress, has not created for Mr. D "property [or] rights to property" in his wife's retirement deductions that are assailable by IRS.

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[2] Public Law No. 94-166 mistakenly designated the new subsection in § 8345 as "(g)" and made the same mistake in § 8346(a). The errors were corrected by Pub. L. No. 95-366, 92 Stat. 600 (1978).

[3] Section 8345(j) in effect negated, as it applied to OPM, the provision in the definition of "alimony" in 42 U.S.C. § 662(c) that excluded payments based on community property laws. *See* note 1, *supra.*

[4] *See* H.R. Rep. No. 446, 94th Cong., 1st Sess. 1-2 (1975).

[5] 39 Comp. Gen. 203 (1959); 27 Comp. Gen. 703 (1948); 21 Comp. Gen. 1000 (1942). These opinions, insofar as relevant here, were grounded on general principles of setoff.

[6] *Cf.* H.R. Rep. No. 713, 95th Cong., 1st Sess. 2 (1977), accompanying the bill that enacted § 8345(j). At p. 2 the Committee paraphrased the second "except" clause of § 8346(a) as follows: "except as may be *expressly* provided by Federal laws" (emphasis added). S. Rep. No. 1084, 95th Cong., 2d Sess. 2 (1978), contains the same paraphrase.

We are not inattentive to the judicial doctrine that state law generally governs the determination whether a federal taxpayer has an ownership interest in property sufficient for an IRS levy to grasp for taxes due from him. *Aquilino* v. *United States*, 363 U.S. 509 (1960). That rule, of course, is subject to the strictures of the Supremacy Clause of the Constitution. *See Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979); *United States* v. *Yazell*, 382 U.S. 341, 352 (1966). However, we do not view the gloss put on § 6331(a) by *Aquilino* and similar cases as being pertinent here. It is one thing to hold that, paramount federal interests aside, the government should abide by state laws "in the field of family and family-property arrangements." *United States* v. *Yazell*, 382 U.S. at 352. It is another to conclude that the United States is bound by state law in its own administration of the Civil Service Retirement System.

There is no clash between federal and state interests here that requires scrutiny in the light of the Supremacy Clause. What is involved in reality is a clash between two federal policies, one calling for the expeditious collection of taxes and the other for the protection of retirement deductions and benefits so that they will be paid to the persons who earned them. Since, in the instant matter, the barrier of 5 U.S.C. § 8346(a) remains in place to block the thrust of the power granted IRS by 26 U.S.C. § 6331(a), there can be no question that the latter policy prevails.

> We are mindful of the consideration that legislation in aid of collection of Government revenues should be liberally construed and applied. There is obviously an imperative public interest in favor of the prompt collection of delinquencies. But manifestly it cannot be validly considered an overriding policy in any particular situation unless Congress has so demonstrated its intention.

United States v. *Sullivan*, 333 F. 2d 100, 119 (3d Cir., 1964).

In summary, IRS is not entitled to obtain any of Mrs. D's funds from OPM for application against her husband's tax liability.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Disclosure of Tax Division Files for Purposes of General Accounting Office Audit

Under 31 U.S.C. § 67 and 26 U.S.C. § 6103, the Tax Division of the Department of Justice may disclose to the General Accounting Office (GAO) case files containing tax returns and related information for the purpose of and to the extent necessary in GAO's audit of Internal Revenue Service operations.

January 13, 1981

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION

This responds to your request for the opinion of this Office as to whether it is permissible for you to disclose to the General Accounting Office (GAO) your files concerning certain tax cases. On October 17, 1979, the Chairman of the Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Committee on Government Operations requested the Comptroller General to review the activities of the Internal Revenue Service (IRS) with respect to tax protester activities. The review is designed to assess the nature and scope of the tax protester problem and to evaluate the actions taken by the IRS in dealing with that problem. As part of its review, GAO has requested that the Tax Division of the Department of Justice furnish its files with respect to 16 test cases involving alleged "vow of poverty" protester schemes. Prosecution has been declined in eight cases and authorized in the others. Your inquiry relates specifically to your files, each of which you state contains tax returns and return information.[1] We believe that the Tax Division is permitted to disclose such material to GAO under the provisions of 31 U.S.C. § 67 and 26 U.S.C. § 6103.

I. Background

The Tax Reform Act of 1976 enacted into law 26 U.S.C. § 6103, whose principal purpose is to establish "a general rule that tax returns and return information are to be confidential and not subject to disclosure except as specifically provided by statute." House Committee on Ways and Means, 94th Cong., 2d Sess., Summary of the Conference

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[1] We are informed that GAO does not seek grand jury material, whose disclosure is governed by Fed. Rule Crim. Proc. 6(e).

Agreement on the Tax Reform Act of 1976 (H.R. 10612), 43 (Comm. Print 1976). Under 26 U.S.C. § 6103(a), no officer or employee of the United States is permitted to "disclose any return or return information obtained by him . . . in connection with his service as such an officer or an employee . . . ." The term "return" is defined as any part of a "tax or information return, declaration of estimated tax, or claim for refund . . . ." § 6103(b)(1). The term "return information" is defined as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing . . . ." § 6103(b)(2).

Section 6103 contains a number of limited exceptions to the general rule of confidentiality. The exception relevant for purposes of the present inquiry appears in § 6103(i)(6). That provision states, in pertinent part, that "upon written request by the Comptroller General of the United States, returns and return information shall be open to inspection by, or disclosure to, officers and employees of the General Accounting Office for the purpose of, and to the extent necessary in, making—(i) an audit of the Internal Revenue Service . . . which may be required by section 117 of the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 67) . . . ." The relevant provision of 31 U.S.C. § 67 in turn empowers the Comptroller General to "make, under such rules and regulations as he shall prescribe, audits of the Internal Revenue Service." It authorizes GAO representatives to inspect returns and return information "[f]or the purposes of, and to the extent necessary in," making those audits. GAO representatives are also permitted access "to all other books, accounts, financial records, reports, files, papers, things, and property belonging to or in use by the Internal Revenue Service . . . ." 31 U.S.C. § 67(d) (Supp. I 1977).

For present purposes, the principal questions are (1) whether the GAO's requested examination of Tax Division files would be "for the purpose of, and to the extent necessary in, making an audit of the Internal Revenue Service"; and (2) whether § 6103(i)(6) contemplates disclosure by any agency having lawful possession of returns and return information. We believe that the answer to both questions is in the affirmative.

II. Discussion

Under § 6103(i)(6), returns and return information may be disclosed to the GAO only "for the purpose of, and to the extent necessary in," making an audit of the IRS. This provision was enacted to carry out a general congressional goal of "permit[ting] the GAO to independently conduct management audits to review IRS administration of the tax laws." H.R. Rep. No. 480, 95th Cong., 1st Sess. 6 (1977). The provision resolved a longstanding dispute between GAO and IRS with respect to GAO's authority to examine IRS files. The legislation was designed to enable the "GAO . . . [to] serve as a means of identifying alleged IRS abuses and weakness," *id.*, for Congress believed that "as a consequence of [its] refusal [to allow inspection], IRS' . . . management practices and administration of the tax laws have not been as efficient as they otherwise would have been." *Id.* at 7. Congress thus intended "that the GAO examine returns and individual tax transactions only for the purpose of, and to the extent necessary to serve as a reasonable basis for, *evaluating the effectiveness, efficiency and economy of IRS operations and activities.*" General Explanation of the Tax Reform Act of 1976, Joint Committee on Taxation, H.R. Rep. No. 10612, 94th Cong., 2d Sess. 337 (1976) (emphasis added). *See also* S. Rep. No. 42, 95th Cong., 1st Sess. 1 (1977). Congress' authorization of disclosure of returns and return information to the GAO must be read in light of this overriding purpose.

The Tax Division files contain two principal items: (1) tax returns and (2) files of the Division that contain returns and return information. The first question is whether disclosure of that material is justified as "for the purpose of, and to the extent necessary in," auditing the IRS. We believe it is so justified. We note, first, that both the IRS and GAO[3] are agreed that disclosure of the documents at issue is properly regarded as "necessary in" making an audit of the IRS. This construction of the statute, agreed upon by the two agencies responsible for administering the statute's relevant provision, "is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act." *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 (1980). The IRS and GAO state that review of the Department's files may well aid GAO in assessing the effectiveness of the IRS' operations. The files may themselves evaluate IRS actions and will in all likelihood indicate whether the IRS has been referring cases to the Department of Justice in appropriate circumstances. GAO's task would be facilitated if, for example, the Department has concluded that the IRS has compiled insufficient evidence in cases in which it has recommended prosecution. GAO would also be aided if the files showed that IRS recommendations were being followed in most cases or that the reasons why prosecution was declined had nothing to do with the IRS' performance. The files may well show whether the IRS has properly selected, investigated, developed, and referred criminal cases. For these reasons, we believe that the interpretation offered by GAO and IRS is a "reasoned and supportable" one.

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[3] The IRS and GAO were requested to provide memoranda expressing their views on the questions presented, and they reached identical conclusions.

The second question is whether § 6103(i)(6) contemplates disclosure by any agency having lawful possession of returns and return information, or whether the disclosure must be made solely by IRS personnel. In this context as well, the IRS and GAO are agreed that the statute permits disclosure by the Tax Division. We believe that the language, history, and structure of the statute are compatible with this view. First, § 6103(i)(6) states in broad terms that returns and return information "shall be open to inspection by, or disclosure to" GAO. The statute does not state that the materials should be disclosed only by the Secretary of the Treasury. This is a significant factor, for a number of the tax disclosure provisions state in plain terms that it is "the Secretary" who "may" or "shall" disclose returns or return information. *See* 26 U.S.C. § 6103(c), (f), (g). Similarly, the legislative history contains no indication that disclosure under § 6103(i)(6) was to be made solely by the IRS. *See* S. Rep. No. 938, 94th Cong., 2d Sess. 341 (1976). Finally, the structure of the statute supports the interpretation offered by the GAO and IRS, for, as noted, Congress made explicit who the releasing party must be when it intended that disclosure be made only by that party.[3]

We conclude by observing that anomalous results would be produced if the interpretation proposed by GAO and the IRS were rejected. There is no dispute that the relevant returns and return information may be obtained from the IRS, which has copies of the tax returns in question. The intention underlying the tax disclosure provisions of the Act—to limit undue circulation of returns and return information—would plainly not be furthered if § 6301(i)(6) were interpreted to preclude disclosure of the Tax Division's files, for the same information protected by the tax disclosure provisions is available to GAO in any event. The statutory purpose of preventing disclosure of returns and return information would not, therefore, be served if GAO's request were denied. As a result, we see no sufficient basis for rejecting the interpretation offered by GAO and IRS. We conclude that you are permitted to disclose the files in question.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

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[3] We also note that the Secretary of the Treasury has promulgated regulations permitting disclosure by other federal agencies in lawful possession of returns and return information even when the statute on its face requires disclosure by the Secretary. *See* Treas. Reg. § 301.6103(p)(2)(B)-1(a).

Authority of the Federal Bureau of Investigation to Investigate Police Killings

The Federal Bureau of Investigation is not presently authorized to investigate killings of non-federal law enforcement officers which involve only violations of state law, even in response to a presidential directive.

January 16, 1981

MEMORANDUM OPINION FOR THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

This responds to your request for our views on the extent of the Federal Bureau of Investigation's (FBI's) authority to investigate the killing of a non-federal law enforcement officer when requested to do so by a local law enforcement official. Your question is directed specifically to investigations involving violations of state law but not federal law. In addition to the threshhold question of authority, you also pose questions regarding the form of the request for assistance (whether written or oral); the need, if any, to seek statutory authority for the investigation; and the propriety of continuing the investigations in advance of this legislation. We conclude that the FBI does not presently have the authority to conduct these investigations. The form of the request for assistance is therefore irrelevant. Whether legislation should be sought to authorize investigations of this nature depends on whether the FBI desires to continue to respond to requests for assistance from local authorities. If so, legislation must be sought; and the FBI has no authority to conduct such investigations in the interim.

I. Background

The FBI's investigation of killings of non-federal law enforcement officers apparently began in response to a presidential directive of November 1, 1970, from President Nixon to Attorney General Mitchell.[1] Noting the increasing number of assaults on law enforcement officers, President Nixon directed the Attorney General "to make available all appropriate investigative resources of the Department of Justice to work jointly with State or local police when requested in any case involving an assault upon a police officer." [2] Subsequently, on June 3, 1971, President Nixon met with the Attorney General, the Director of the FBI, Representatives of Congress, and 19 police executives from around the country. The President announced that, in addition to the previously available services of the FBI laboratory, the Identification Division, the National Crime Information Center, and the investigation of out-of-state leads, the FBI would actively participate in the investigation of police killings when a local law enforcement agency requested the assistance. On June 4, 1971, the FBI Director instructed all field divisions regarding the new policy, advising them to obtain a written request for assistance and then "work the investigation like we would a bank robbery case, jointly, toward the solution of the killing."

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[1] Our search for communications or memoranda discussing the legality of the proposed investigations has disclosed no record in the files of this Office or anywhere else in the Department prior to the date of the directive. We have also made informal inquiries at the Office of Management and Budget and have been advised that background documents that may have been connected to President Nixon's directive, if any, are no longer retrievable.

An internal FBI memorandum of June 5, 1971, recognized "the unique situation involved[,] there being at this time no Federal law providing penalties for the killing of a local law enforcement officer." Accordingly, the memorandum advised that the views of the Department of Justice should be sought on some of the legal issues incident to the new policy. By memorandum of the same date, the Director of the FBI requested an opinion from the Attorney General regarding the FBI's jurisdiction to investigate a purely local offense.[3]

The Assistant Attorney General in charge of the Criminal Division replied by memorandum of June 28, 1971. Having noted a proposed line item for inclusion in the FBI's annual appropriation providing for investigation of police killings, the memorandum concluded that FBI jurisdiction to investigate posed no problem. "Congressional authorization to expand funds for assistance of state law enforcement activities appears to us a proper exercise of the spending power." [4]

The appropriation apparently relied on in that June 28, 1971, memorandum was not enacted as proposed; and questions about the FBI's jurisdiction continued. On November 1, 1979, the FBI's Legal Counsel Division, by memorandum for the Assistant Director, Planning and Inspection Division, discussed the legality of FBI investigations of police killings and concluded that there was no specific statutory authority. The memorandum suggested that the investigations might be justified because Congress had been made aware of the investigations by statements by the Director in appropriations hearings. "Subsequent Congressional action in appropriating funds for these activities could be construed as tacit approval . . . ." Still, the memorandum recognized the implication of a memorandum of this Office of March 22, 1978, entitled "FBI Cooperation with State or Local Authorities,"[5] which advised that the FBI had no authority to conduct interviews for the benefit of state and local law enforcement agencies where there was no possible violation of federal law. Although noting that the March 22 memorandum did not specifically address the question of FBI authority to act in response to a presidential directive, the Legal Counsel Division concluded that our memorandum did "point out the necessity for clarification in this area." Your request for our advice followed.

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[2] According to an internal FBI memorandum of June 4, 1971, the purpose of the change in policy was to forestall, if possible, the passage of the many bills pending in Congress which would have required the FBI to take over the investigation of police killings. The FBI has consistently resisted all such legislation as an instrusion on local law enforcement responsibilities, and, in some cases, as an excessive demand on FBI investigative resources.

[3] The request was primarily concerned with the FBI's authority to arrest, search, or interrogate a suspect in connection with a local offense.

[4] The memorandum also noted the desirability of a more explicit statutory authorization for warrantless arrests by the FBI in cases not involving violations of federal law. It is not clear from the memorandum whether authority for the investigation of police killings was thought to exist. But it does appear that further statutory authority was thought to be necessary and, moreover, that inclusion of the line item in the appropriation was expected to suffice.

II. The FBI's Legal Authority to Investigate

The FBI's investigative authority derives from the Attorney General's power to appoint officials to detect "crimes against the United States." 28 U.S.C. § 533(1). By regulation, the FBI is empowered to investigate "violations of the laws of the United States." 28 C.F.R. § 0.85(a) (1980). In construing the extent of this power, this Office has issued two memoranda, in addition to that of March 22, 1978, which are relevant.

In a memorandum of November 9, 1977, for the Director of the Federal Bureau of Investigation ("FBI Cooperation with Local Authorities"), we discussed various problems arising in the context of FBI participation in cooperative undercover efforts with local law enforcement authorities. We considered first an investigation initiated in the belief that violations of federal law may be involved, and we concluded that "[a]s long as there remains a legitimate basis for the view that the investigation of the underlying conduct may unearth violations of federal law, we believe that the FBI is authorized to proceed with the investigation." But we further considered the situation where, as the cooperative investigation proceeded, it became clear that the activity in question did not constitute a violation of federal law. We concluded that the FBI could not in such circumstances continue to cooperate with local authorities because "[t]he investigation of violations of state law alone would be beyond the authority conferred on the FBI by 28 U.S.C. § 533(1) and 28 C.F.R. § 0.85." Moreover, incurring expenses other than those necessary for the detection and prosecution of crimes against the United States would result in a violation of 31 U.S.C. § 628, which precludes expenditures except for the purpose for which the appropriation was made. The only exception that we noted was in the context of an investigation from which the FBI's abrupt withdrawal would result in a significant likelihood of physical harm to other participants. In that case, we indicated that the FBI would be justified in continuing its covert activity to the extent necessary to prevent such harm.

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[5] A copy of the memorandum, which was in the form of a memorandum to files, was sent to the FBI.

We also had occasion to consider related issues in a memorandum of February 24, 1978, for the Director of the Federal Bureau of Investigation ("Responsibility and Authority of FBI Agents to Respond to Criminal Offenses Outside the Statutory Jurisdiction of the FBI"). That memorandum dealt with the commission of state law offenses in the presence or immediate vicinity of an FBI agent who then acts either on his own accord or in response to a summons by a local law enforcement officer to detain or arrest the offender. We stated at the outset that we thought it "clear that the FBI has no *federal* authority to take action with respect to violations of state law, even in the exigent circumstances . . . present[ed]." Noting that the FBI's statutory jurisdiction in every respect—investigation, execution of search or arrest warrants, and making arrests without warrants—was limited to acts involving violations of the laws of the United States, we concluded that "[a]ny action taken with respect to the violation of state or local law would thus be beyond the FBI's explicit statutory authority." We did find, however, that certain exigent circumstances would give rise to an agent's obligation and power under state law to intervene in state offenses, specifically, if state law designated the agent a peace officer, if the common law authorized a private citizen to act, or if the common law or state statutory law required a bystander to respond to a summons by a local law enforcement officer.

We see nothing in the question of FBI authority that you now raise that would permit a different answer than that which follows from the plain language of § 533(1) itself and from our three prior memoranda.[6]

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[6] We cannot find congressional approval of the investigations through the device of FBI appropriations following hearings at which Director Hoover referred to the practice. It is true that congressional ratification by subsequent appropriations has been found on occasion, *see Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U.S. 275, 292–94 (1958); *Brooks* v. *Dewar,* 313 U.S. 354, 360–61 (1941); *Sibbach* v. *Wilson & Co.,* 312 U.S. 1, 15–16 (1941); *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 481 (1915). For a number of reasons, however, we find no such ratification here. First, the asserted congressional awareness in this case goes no further than a single committee. Moreover, it is the Appropriations Committee, which has no jurisdiction over FBI activities and whose work is limited, by House and Senate rules, to non-substantive legislation. *See TVA* v. *Hill,* 437 U.S. 153, 189–192 (1978). Second, the unambiguous language of the statute is too plain to admit of a different construction, which is the usefulness of the doctrine of congressional acquiescence. *Jones* v. *Liberty Glass Co.,* 332 U.S. 524, 533–34, (1947); *First Nat. City Bank* v. *United States,* 557 F.2d 1379, 1384 (Ct. Cl. 1977). In these circumstances, we would not be giving effect to a "construction" of the statute; rather, we would be recognizing a repeal (of the limitation on FBI jurisdiction) by implication. *See TVA* v. *Hill, supra; see also SEC* v. *Sloan,* 436 U.S. 103, 121 (1978).

Nor can we find that the agency practice is entitled to the deference that arises in other cases from consistent and longstanding administrative interpretation. Such deference cannot be paid where the practice is inconsistent with or in excess of statutory authority. *E.g., VolksWagenwerk* v. *FMC,* 390 U.S. 261, 272 (1968); Opinion of the Attorney General for the Secretary of Agriculture, June 23, 1980, at 12 [4 Op. O.L.C. 30, 38 (1980)]. *See SEC* v. *Sloan,* 436 U.S. at 117–19.

If there is no reasonable expectation that the investigation will lead to evidence of a violation of federal law—and you specifically pose only the situation where there is none—there is no FBI jurisdiction or authority to investigate. None of the exceptions to this general rule outlined in our prior memoranda is applicable here. First, the authority to begin an investigation cannot be premised on the danger to other law enforcement officials or informers that might result if the FBI were to withdraw from the investigation. Second, the authority under the common law to act upon certain exigencies for crime prevention or apprehension of offenders does not extend to investigations of crimes already committed. Third, state statutory law, although it might conceivably confer investigative authority, could not authorize expenditures that would be incurred in the course of an investigation. The proscriptions of 31 U.S.C. § 628 would still apply.[7]

The Legal Counsel Division's Memorandum appears to suggest that our well-established view of FBI jurisdiction might be different if, as here, the activity was bottomed on a presidential directive. Under 28 U.S.C. § 533(3), the Attorney General may appoint officials "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." We have previously recognized that pursuant to this section, the FBI could conduct such investigations as were ordered by a presidential directive related to the President's exercise of his constitutional or statutory functions. Memorandum of June 16, 1976, from Assistant Attorney General Scalia, Office of Legal Counsel, to Associate Deputy Attorney General Giuliani ("FBI Authority to Conduct Investigations of Potential Vice-Presidential Nominees").[8] But we see no reason to believe that the purpose of an investigation of a police killing is related to any specific statutory or constitutional power of the President.[9] Thus, this purported investigatory power is not authorized by 28 U.S.C. § 533(3).[10]

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[7] We did not address 31 U.S.C. § 628 in our memorandum of February 24, 1978, possibly because an agent's actions in arresting or detaining a state law violator in an emergency situation involve no extraordinary expenses.

[8] The memorandum concluded that no constitutional or statutory authority existed to support a presidential directive to the FBI to investigate possible vice-presidential nominees, and so there was no discussion of how directly related the investigation must be. The memorandum does suggest, however, that more than an indirect relation is required. Although recognizing that the President's general powers to "take care that the laws be faithfully executed," U.S. Const., Art. II, § 3, or his nominating powers, Art. II, § 2, could provide the basis for certain investigations, we nevertheless concluded that neither justification would apply in the case of a vice-presidential nominee; for the President has no responsibility or powers under the Constitution to screen candidates for public office. We further considered the President's need to assure the trustworthiness of a candidate who would receive a national security briefing. But we found no practice of providing such briefing to vice-presidential candidates and, moreover, a "possible constitutional impediment to conditioning the conferral of such a clear benefit in the political campaign upon agreement to an investigation, particularly when the incumbent President himself is an opposing candidate."

III. Proposals for Legislation

You also asked, in the event that we determined that the FBI lacked the authority to investigate police killings, that we advise whether authorizing legislation can or should be sought. The question whether legislation should be sought is a policy decision. However, if such investigations are to continue, legislation will be required. We see no constitutional infirmity with either of two legislative proposals that have been considered in the past. First, the killing of a police officer could be made a federal crime, as to which the FBI already possesses investigative authority under 28 U.S.C. § 533(1). Second, specific investigative authority for police killings could be added to the FBI jurisdiction conferred under 28 U.S.C. § 533. Such authority could be conditioned upon a request for assistance by a local law enforcement agency, or it could be conferred in all police killing cases. We have no doubt about the sufficiency of the federal interest in local law enforcement to enable Congress to proceed either by amendment to the criminal code or to § 533.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

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[9] In view of our conclusion that 28 U.S.C. § 533(3) does not apply, we have no occasion to determine what particular action is necessary to invoke the powers under that section. We do note, however, that the directive of November 1, 1970, charged only that the Attorney General should use "all *appropriate* investigative resources" (emphasis added) and did not purport to be an independent basis of investigative authority pursuant to § 533(3). We should add, moreover, that although it is not possible conclusively to determine what was meant in the directive by "appropriate" resources, it does appear that the directive was thought to be the basis for investigations not previously within the FBI's range of operations. That is, we do not believe that the directive was intended only to authorize FBI investigations where "appropriate" under existing statutory authority and agency practice. In light of our conclusion, however, that investigations of non-federal offenses are outside the FBI's jurisdiction, we would now read the directive merely to emphasize that FBI resources may be used in an "appropriate" case, e.g., where there is a reasonable likelihood of uncovering a violation of federal law, and in an "appropriate" manner, e.g., as determined by law enforcement officials in their expertise and in light of all the circumstances.

[10] Moreover, in the absense of any authority under either § 533(1) or § 533(3) for the FBI to act upon a request by a state or local law enforcement official for investigative assistance, the form of the request, whether written or oral, is of course irrelevant.

Restructuring the Relationship Between the Federal Government and Radio Free Europe/Radio Liberty

No impermissible conflict of interest arises from the practical identity of grantor and grantee of federal funds, where such an arrangement has been authorized by federal statute.

No separation of powers concern is implicated by Congress' appropriation of funds directly to a private entity whose functions relate exclusively to the flow of information; nor does this situation raise a problem of excessive delegation of government authority to the private sector.

January 23, 1981

MEMORANDUM OPINION FOR THE BOARD OF INTERNATIONAL BROADCASTING

This responds to your request for the opinion of this Office on two questions relating to the possible restructuring of the relationship between the federal government and Radio Free Europe/Radio Liberty, Incorporated (RFE/RL).

RFE/RL is a private nonprofit corporation entirely dependent upon federal funds, which it receives under an annual grant from the Board for International Broadcasting (BIB), a federal entity created in 1973 pursuant to Pub. L. No. 93-129, 87 Stat. 456 (1973). Under this law, the BIB is responsible for ensuring the continuation of RFE/RL as an independent broadcast medium; at the same time BIB is also charged with ensuring that its grants to RFE/RL are applied in a manner not inconsistent with the broad foreign policy objectives of the U.S. government. Pursuant to these complementary statutory mandates, the board of directors of RFE/RL operates under the general oversight of the BIB and is subject to its direction in matters of concern to the U.S. government.

Proposals to reform or simplify the relationship between the federal government and RFE/RL have generally taken the form of merging the private and public boards, or eliminating one of them. One such suggestion, which was reported out of the Senate Foreign Relations Committee in 1977 but defeated on the floor, was to condition further grants to RFE/RL on having the presidentially appointed members of the BIB also serve as the board of directors of RFE/RL. Another more recent proposal is that the BIB be abolished and funds appropriated directed to RFE/RL.

With respect to the first proposal, you ask whether any conflict of interest arising from the practical identity of grantor and grantee would pose a legal problem. If such an arrangement were in fact incorporated into the statute as was proposed in 1977, and thus authorized by law, there would be no legal basis on which any resulting conflict of interest could be successfully challenged. Nor would there appear to be any issue of constitutional dimension in such a conflict.

Your second question relates to the suggested abolition of the BIB, and the direct appropriation of funds to the private corporation, RFE/RL.[1] Contrary to the advice you have received from counsel for RFE/RL, in our view there would be no legal or constitutional bar to channelling federal funds for private expenditure in this manner, although we have not found any precedent directly in point. There is no statute which inhibits Congress' power, if it wishes to do so, to appropriate directly to a private corporation for the purpose of accomplishing governmental objectives. And, assuming Congress took all necessary legislative steps to effectuate its desired end, we perceive no legal basis on which to object to it.

Nor is there any principle of constitutional law which would necessarily be implicated by a direct legislative appropriation to a private entity.[2] To be sure, Congress generally includes some provision for supervision by some executive agency of the use of federal funds in any appropriation intended for use in the private sector. And, one of the consistent themes in discussions of the continued funding of RFE/RL over the years has been Congress' concern to ensure accountability in its use of public monies. But these concerns, and the controls imposed pursuant to them, are grounded in political and administrative considerations, not in any requirement imposed by the Constitution.

The teaching of *Buckley* v. *Valeo*, 424 U.S. 1 (1976), does not suggest the contrary. The relevant holding in the *Buckley* case is that Congress may not, consistent with the constitutional principle of separation of powers, seek to remove from the control of the Executive Branch its power to administer and enforce public law. At issue in that case were rulemaking and enforcement functions which Congress had vested in the Federal Elections Commission, a body whose members Congress itself appointed. The Court held that because these functions

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[1] You state that in this case some or all of the directors of RFE/RL might be appointed by the President. Our conclusions on the permissibility of a direct appropriation to RFE/RL do not depend on the status of all or any of its directors as presidential appointees, and we have therefore not taken this possibility into account in our analysis.

[2] As a practical matter, Congress' appropriation would be framed as a directive to the Secretary of the Treasury to cause certain funds to be paid to the private corporation. However, the Secretary of the Treasury would have no discretion to determine whether the corporation were entitled to receive it. *United States* v. *Price*, 116 U.S. 43 (1885).

"represent[ed] the performance of a significant governmental duty exercised pursuant to a public law," 424 U.S. at 141, the Commission's members must be appointed by the President in the manner contemplated in Article II, § 2, clause 2 of the Constitution. Among the functions mentioned by the Court as requiring performance by a presidential appointee were the conduct of litigation, rulemaking and advisory opinions, and determinations of eligibility for federal funds and for federal elective office. By contrast, among the Commission's powers which the Court noted might appropriately have been given legislative appointees were those "relating to the flow of necessary information—receipt, dissemination, and investigation . . . ." 424 U.S. at 137. Some expenditure of public funds is necessarily involved in these latter activities, and it is therefore plain that responsibility for expenditure of federal funds in and of itself is not within the class of "significant governmental duties" which can be performed only by a presidential appointee.

We are aware of no authority given RFE/RL under the law which would constitute "the performance of a significant governmental duty" so as to require that it be retained within the Executive Branch. The Commission has no power to make rules or interpret laws as they apply to other persons or entities. It has no authority to conduct litigation in the name of the government, nor otherwise to apply or enforce the law. Its only responsibilities under the law are of precisely the sort which the Court noted in *Buckley* could be delegated outside the Executive Branch: functions relating to the flow of information. Even if these functions were somehow regarded as having a "public" character in this context, this would not be sufficient to require their performance by an officer of the United States.

Related to the separation of powers principle at issue in *Buckley*, and susceptible to similar analytic treatment, is the delegation doctrine. This doctrine, as relevant here, expresses the constitutional concern that significant executive or legislative power be exercised by an officer of the United States appointed or elected, respectively, in accordance with the Constitution. *See* Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 Indiana L.J. 650 (1975). As noted, we are unaware of any situation in which RFE/RL would be vested with the sort of executive or legislative authority which would trigger a concern for excessive delegation to the private sector.

We would be happy to be of further assistance to you as proposals for restructuring the government's relationship with RFE/RL are developed.*

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

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*NOTE: In 1982, Congress enacted a law by which further federal grants to RFE/RL were made conditional upon amendment of the RFE/RL certificate of incorporation to restrict membership on the RFE/RL board to the presidentially appointed members of the Board for International Broadcasting. Pub. L. No. 97-241, § 11, 96 Stat. 273, 296-97 (1982). Ed.

Presidential Memorandum Delaying Proposed and Pending Regulations

The President has authority, under Article II, § 3 of the Constitution, to direct executive agencies to postpone proposed and pending regulations for a 60-day period.

Even where a regulation has been published in final form, the Administrative Procedure Act does not require an agency to follow notice and comment procedures in connection with a temporary postponement of its effective date, since such a postponement will not generally be regarded as a rulemaking. Even if it were so regarded, an agency will in general have good cause for dispensing with notice and comment procedures where a new President is assuming office during a time of economic distress.

January 28, 1981

MEMORANDUM OPINION FOR THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

The President is currently considering a series of measures to establish new procedures for the supervision of the regulatory process and the improvement of federal regulation. Among those measures is a proposed Memorandum to the heads of certain executive departments and agencies, directing a 60-day postponement in the effective date of pending and proposed regulations. This memorandum will discuss the legal basis for the President's directive and will outline the procedures for affected agencies to follow in complying with that directive.*

The President's authority to impose obligations of the kind included in the proposed Memorandum derives from his power to ensure that the laws are faithfully executed. U.S. Const., Art. II, § 3. This provision authorizes the President to supervise and guide executive agencies and officers in the execution of their responsibilities. As the Supreme Court stated in *Myers* v. *United States,* 272 U.S. 52, 135 (1926):

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contem-

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*Note: The President's Memorandum, entitled "Postponement of Pending Regulations," was published on January 29, 1981, 46 Fed. Reg. 11227. Ed.

> plated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control.

In accordance with these principles, we believe that the President's authority to direct executive agencies to postpone proposed and pending regulations for a 60-day period, for the reasons stated in the Memorandum, is beyond reasonable dispute. *See generally* Bruff, *Presidential Power and Administrative Rulemaking,* 88 Yale L.J. 451 (1979).

The proposed Memorandum covers two major categories of regulations: those which have been proposed but have not been published in final form; and those which have been published in final form but have not taken legal effect. As to the first category, the Administrative Procedure Act (APA) imposes no special procedural requirements. The notice and comment procedures of 5 U.S.C. § 553 need not be followed, for nothing in that provision requires an agency to allow a period for comment on a decision briefly to delay final adoption of a proposed rule. However, the agency's decision may be subject to judicial review, and the agency may have to furnish a reasoned explanation for that decision. *See ASG Industries, Inc.* v. *Consumer Product Safety Commission,* 593 F.2d 1323, 1335 (D.C. Cir. 1979). The explanation here—that the new Administration needs time to review initiatives proposed by its predecessor—is, we believe, sufficient.

The second category of regulations covered by the President's Memorandum raises somewhat different legal issues. Under the APA, a substantive rule must be published "not less than 30 days before its effective date." 5 U.S.C. § 553(d). As the language and legislative history of this provision make clear, the 30-day period is a minimum, and agencies are generally free to delay the effectiveness of regulations beyond the 30-day period. *See Administrative Procedure Act—Legislative History,* S. Doc. No. 248, 79th Cong., 2d Sess. 259–60 (1946) (reproducing report of House Committee on the Judiciary); *id.* at 201 (report of Senate Committee on the Judiciary). The purposes of the 30-day delay in effective date are, first, to permit private parties to adjust their conduct in order to conform to new regulations and, second, to permit agencies to correct errors or oversights. *See id.* at 259–60, 359; Final Report, Attorney General's Committee on Administrative Procedure 114–15 (1941); *Sannon* v. *United States,* 460 F. Supp. 458, 467 (S.D. Fla. 1978). It is therefore plain that the APA permits an agency to adopt in the first instance an effective date provision extending beyond 30 days. We do not find anything in the language or legislative history of

§ 553(d) to suggest that agencies are forbidden to reach the same result by initially providing a 30-day period, and subsequently taking action to extend this period.

Nevertheless, it is necessary to consider what procedures an agency must follow in order to extend an effective date provision after the regulations at issue have been published in final form but have not yet become effective. For purposes of § 553, the issue is whether a suspension of the effective date of a rule is an "amendment" of the rule.[1] If so, notice and comment procedures or a finding of good cause to dispense with them are required before an agency may suspend the operation of a rule, and the regulations issued by the previous Administration will take effect before the new Administration has an opportunity to review them.

We believe that such a result would not comport with either the terms or the purposes of § 553. Therefore, we conclude that a 60-day delay in the effective date should not be regarded as "rule making" for the purposes of the APA. Although such a delay technically alters the date on which a rule has legal effect, nothing in the APA or in any judicial decision suggests that a delay in effective date is the sort of agency action that Congress intended to include within the procedural requirements of § 553(b).[2] This conclusion is supported by the clear congressional intent to give agencies discretion to extend the effective date provision beyond 30 days. The purposes of the minimum 30-day requirement would plainly be furthered if an extension of the effective date were not considered "rule making," for such an extension would permit the new Administration to review the pertinent regulations and would free private parties from having to adjust their conduct to regulations that are simultaneously under review.

We would note, however, that even if an extension of effective dates does not trigger notice and comment procedures, it may still be subject to judicial review under § 706. A statement of reasons for the deferral should therefore be provided. *See Action for Children's Television* v. *FCC*, 564 F.2d 458, 478–79 (D.C. Cir. 1977). For this purpose a reference to the President's Memorandum should be sufficient in most cases. The exception would be any rule for which the effective date has been a matter of controversy during the notice and comment period. In these cases, the explanation should refer to the specific considerations justifying deferral of the rule in question.[3]

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[1] Under 5 U.S.C. § 553, notice and comment procedures must be followed for "rule making" unless "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. § 551(5), the term "rule making" is in turn defined as "agency process for formulating, amending, or repealing a rule."

[2] Indeed, it is not clear that an agency is, as a general rule, required to provide an opportunity for comment on the intended effective date of a rule in the first instance. If agencies are not required to do so, a mere extension of that provision would not trigger the procedures of § 553.

Even if the suspension of a rule's effective date is regarded as rulemaking, we believe that agencies will in general have good cause for dispensing with notice and comment procedures. A new President assuming office during a time of economic distress must have some period in which to evaluate the nature and effect of regulations promulgated by a previous Administration. *Cf. Nader* v. *Sawhill,* 514 F.2d 1064 (Temp. Emer. Ct. App. 1975) (good cause for dispensing with notice and comment when increase in petroleum price necessitated by economic conditions); *Reeves* v. *Simon,* 507 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied,* 420 U.S. 991 (1975) (same conclusion for regulation issued during gasoline crisis); *Derieux* v. *Five Smiths, Inc.,* 499 F.2d 1321 (Temp. Emer. Ct. App.), *cert. denied,* 419 U.S. 896 (1974) (same conclusion for executive order freezing prices and salaries). If notice and comment procedures were required, the President would not be permitted to undertake such an evaluation until the regulations at issue had beome effective. A notice and comment period, preventing the new Administration from reviewing pending regulations until they imposed possibly burdensome and disruptive costs of compliance on private parties, would for this reason be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). This rationale furnishes good cause for dispensing with public procedures for a brief suspension of an effective date.

For the foregoing reasons, we conclude that: (1) the President's Memorandum is a lawful exercise of his authority; (2) agencies need not allow a period for notice and comment on a 60-day suspension of the effective date of proposed regulations; and (3) at least in general, agencies need not allow such notice and comment for final but not yet effective regulations, and may comply with legal requirements with a simple statement incorporating the President's reasons for the proposed suspension.[4]

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[3] If the effective date provision in a final rule has been the product of an agency resolution of a dispute among affected parties, the view that an alteration of the effective date is an "amendment" under the APA is of greater weight. Even in such cases, however, there may be good cause to dispense with notice and comment procedures. The explanation of specific considerations discussed in text above should suffice as a good cause statement even if the agency action is viewed as rulemaking.

[4] As indicated above, a more detailed explanation may be necessary when the effective date provision was itself a subject of controversy during the notice and comment period.

Proposed Executive Order Entitled "Federal Regulation"

[The following memorandum, prepared by the Office of Legal Counsel pursuant to its responsibility under Executive Order No. 11,030 for approving all executive orders and presidential proclamations for form and legality, analyzes the provisions of a proposed executive order imposing certain procedural and substantive requirements on executive agencies in connection with their rulemaking functions. It concludes that the order's provisions for presidential oversight of the administrative process are generally within the President's constitutional authority, and that they do not displace functions vested by law in particular agencies. It also concludes that the order's requirement that agencies reconsider final rules which have not yet become effective may in certain circumstances trigger the notice and comment provisions of the Administrative Procedure Act.]

February 13, 1981

MEMORANDUM

The attached proposed executive order was prepared by the Office of Management and Budget (OMB) in consultation with this Office, and has been forwarded for the consideration of this Department as to form and legality by the Office of Management and Budget with the approval of its Director. The proposed order is designed to reduce regulatory burdens, to provide for presidential oversight of the administrative process, and to ensure well reasoned regulations. The order sets forth a number of requirements that Executive Branch agencies must adhere to in exercising their statutory rulemaking authority. We conclude that the order is acceptable as to form and legality.*

The order has the following major provisions. Agencies must take action only if the potential benefits outweigh the social costs; attempt to maximize social benefits; choose the least costly alternative in selecting among regulatory objectives; and set priorities with the aim of maximizing net benefits. All of these requirements must be followed "to the extent permitted by law." The order would require agencies to prepare for each "major rule" a Regulatory Impact Analysis (RIA) setting forth a description of the potential costs and benefits of the proposed rule, a determination of its potential net benefits, and a description of alternative approaches that might substantially achieve regulatory goals at a lower cost. Agencies would be required to determine that any proposed regulation is within statutory authority and that the factual conclusions upon which the rule is based are substantially supported by the record viewed as a whole. The Director of the Office of Management and Budget and the Presidential Task Force on Regulatory Relief would be given authority, *inter alia,* to designate proposed or existing rules as major rules, to prepare uniform standards for measuring costs and benefits, to consult with the agencies concerning preparation of RIAs, to state approval or disapproval of RIAs and rules on the administrative record, to require agencies to respond to these views (and to defer rulemaking while so consulting), and to establish schedules for review and possible revision of existing major rules. The order would require agencies to defer rules that are pending on the date of its issuance, including rules that have been issued as final rules but are not yet legally effective, and to reconsider them under the order. By its terms, the order would create no substantive or procedural rights enforceable by a party against the United States or its representatives, although the RIA would become part of the administrative record for judicial review of final rules.

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*NOTE: Executive Order No. 12,291, entitled "Federal Regulation," was signed by the President on February 17, 1981, 3 C.F.R. 127 (1982 ed.). Ed.

I. Legal Authority: In General

The President's authority to issue the proposed executive order derives from his constitutional power to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. It is well established that this provision authorizes the President, as head of the Executive Branch, to "supervise and guide" executive officers in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." *Myers* v. *United States,* 272 U.S. 52, 135 (1926).[1]

The supervisory authority recognized in *Myers* is based on the distinctive constitutional role of the President. The "take care" clause charges the President with the function of coordinating the execution of many statutes simultaneously: "Unlike an administrative commission confined to the enforcement of the statute under which it was created . . . the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed," *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting). Moreover, because the President is the only elected official who has a national constituency, he is uniquely situated to design and execute a uniform method for undertaking regulatory initiatives that responds to the will of the public as a whole.[2] In fulfillment of the President's constitutional responsibility, the proposed order promotes a coordinated system of regulation, ensuring a measure of uniformity in the interpretation and execution of a number of diverse statutes. If no such guidance were permitted, confusion and inconsistency could result as agencies interpreted open-ended statutes in differing ways.

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[1] In *Buckley* v. *Valeo,* 424 U.S. 1, 140–41 (1976), the Supreme Court held that any "significant governmental duty exercised pursuant to a public law" must be performed by an "Officer of the United States," appointed by the President or the Head of a Department pursuant to Article II, § 2, clause 2. We believe that this holding recognizes the importance of preserving the President's supervisory powers over those exercising statutory duties, subject of course to the power of Congress to confine presidential supervision by appropriate legislation. *See also* n.7, *infra.*

Nevertheless, it is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress.[3] In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). It is with these basic precepts in mind that the proposed order must be approached.

We believe that an inquiry into congressional intent in enacting statutes delegating rulemaking authority will usually support the legality of presidential supervision of rulemaking by executive agencies. When Congress delegates legislative power to executive agencies, it is aware that those agencies perform their functions subject to presidential supervision on matters of both substance and procedure. This is not to say that Congress never intends in a specific case to restrict presidential supervision of an executive agency; but it should not be presumed to have done so whenever it delegates rulemaking power directly to a subordinate executive official rather than the President. Indeed, after *Myers* it is unclear to what extent Congress may insulate executive agencies from presidential supervision. Congress is also aware of the comparative insulation given to the independent regulatory agencies, and it has delegated rulemaking authority to such agencies when it has sought to minimize presidential interference. By contrast, the heads of non-independent agencies hold their positions at the pleasure of the President, who may remove them from office for any reason. It would be anomalous to attribute to Congress an intention to immunize from presidential supervision those who are, by force of Article II, subject to removal when their performance in exercising their statutory duties displeases the President.

Of course, the fact that the President has both constitutional and implied statutory authority to supervise decisionmaking by executive agencies does not delimit the extent of permissible supervision. It does suggest, however, that supervision is more readily justified when it does not purport wholly to displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official. A wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official. *See Myers* v. *United States*, 272

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[2] *See* Bruff, *Presidential Power and Administrative Rulemaking*, 88 Yale L.J. 451, 461–62 (1979).

[3] In certain circumstances, statutes could invade or intrude impermissibly upon the President's "inherent" powers, but that issue does not arise here.

U.S. at 135: "Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." This suggestion is based on the view that Congress may constitutionally conclude that some statutory responsibilities should be carried out by particular officers without the President's revision, because such officers head agencies having the technical expertise and institutional competence that Congress intended the ultimate decisionmaker to possess.[4] Under this analysis, of course, lesser incursions on administrative discretion are easier to support than greater ones. This Office has often taken the position that the President may consult with those having statutory decisionmaking responsibilities, and may require them to consider statutorily relevant matters that he deems appropriate, as long as the President does not divest the officer of ultimate statutory authority.[5] Of course, the President has the authority to inform an appointee that he will be discharged if he fails to base his decisions on policies the President seeks to implement.[6]

The order would impose requirements that are both procedural and substantive in nature. Procedurally, it would direct agencies to prepare an RIA assessing the costs and benefits of major rules. We discern no plausible legal objection to this requirement, which like most procedural requisites is at most an indirect constraint on the exercise of statutory discretion. At least as a general rule, the President's authority of "supervis[ion] in his administrative control," *Myers* v. *United States*, 272 U.S. at 135, permits him to require the agencies to follow procedures that are designed both to promote "unitary and uniform execution of the laws" and to aid the President in carrying out his constitutional duty to propose legislation. *See* U.S. Const., Art. II, § 3. We believe that a requirement that the agencies perform a cost-benefit analysis meets these criteria. Further, the President's constitutional right to consult with officials in the Executive Branch permits him to require them to inform him of the costs and benefits of proposed action.[7] In our view, a requirement that rulemaking authorities prepare an RIA is the least that *Myers* must mean with respect to the President's authority to "supervise and guide" executive officials.

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[4] *Cf.* H. Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards 10–11 (1962) (discussing concept of "agency expertise" as reason for delegation of power to particular agencies). The *Myers* Court reaffirmed, however, that even such officers may be dismissed at the pleasure of the President. 272 U.S. at 135.

[5] *See generally*, 1 Op. O.L.C. 75 (1977) (*Proposals Regarding an Independent Attorney General*); 1 Op. O.L.C. 228 (1977) (*Role of the Solicitor General*).

[6] See note 4, *supra*.

[7] *See* U.S. Const., Art. II, § 2 (President may "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").

Substantively, the order would require agencies to exercise their discretion, within statutory limits, in accordance with the principles of cost-benefit analysis. More complex legal questions are raised by this requirement. Some statutes may prohibit agencies from basing a regulatory decision on an assessment of the costs and benefits of the proposed action. *See, e.g., EPA* v. *National Crushed Stone Ass'n,* 449 U.S. 64 (1980). The order, however, expressly recognizes this possibility by requiring agency adherence to principles of cost-benefit analysis only "to the extent permitted by law." The issue is thus whether, when cost-benefit analysis is a statutorily authorized basis for decision, the President may require executive agencies to be guided by principles of cost-benefit analysis even when an agency, acting without presidential guidance, might choose not to do so. We believe that such a requirement is permissible. First, there can be little doubt that, when a statute does not expressly or implicitly preclude it, an agency may take into account the costs and benefits of proposed action. Such a calculus would simply represent a logical method of assessing whether regulatory action authorized by statute would be desirable and, if so, what form that action should take. In our view, federal courts reviewing such actions would be unlikely to conclude that an assessment of costs and benefits was an impermissible basis for regulatory decisions.

Second, the requirement would not exceed the President's powers of "supervision." It leaves a considerable amount of decisionmaking discretion to the agency. Under the proposed order, the agency head, and not the President, would be required to calculate potential costs and benefits and to determine whether the benefits justify the costs. The agency would thus retain considerable latitude in determining whether regulatory action is justified and what form such action should take. The limited requirements of the proposed order should not be regarded as inconsistent with a legislative decision to place the basic authority to implement a statute in a particular agency. Any other conclusion would create a possible collision with constitutional principles, recognized in *Myers,* with respect to the President's authority as head of the Executive Branch.

We believe that the President would not exceed any limitations on his authority by authorizing the Task Force and the OMB Director to supervise agency rulemaking as the order would provide. The order does not empower the Director or the Task Force to displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions.[8] The function of the Task Force and the Director of the Office of Management and Budget would be supervisory in nature. It would include such tasks as the supplementation of factual data, the development and implementation of uniform systems of methodology, the identification of incorrect statements of fact, and the placement in the administrative record of a statement disapproving agency conclusions that do not appear to conform to the principles expressed in the President's order. Procedurally, the Director and the Task Force would be authorized to require an agency to defer rulemaking while it responded to their views concerning proposed agency action. This power of consultation would not, however, include authority to reject an agency's ultimate judgment, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation. As to these matters, the role of the Director and the Task Force is advisory and consultative. The limited power of supervision embodied in the proposed order is, therefore, consistent with the President's recognized powers to supervise the Executive Branch without displacing functions placed by law in particular agencies.

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[8] The Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812, provides some implied statutory support for the Order by giving OMB a direct role in coordinating agency regulations that impose paperwork burdens on the public. With respect to non-independent agencies the Act gives the Director authority to disapprove "unreasonable" agency collection of information requests. 44 U.S.C. § 3504(h)(5)(C). The Act does not authorize him, however, to disapprove the accompanying rule itself insofar as the two are separable. *See* 44 U.S.C. § 3518(e); S. Rep. No. 930, 96th Cong., 2d Sess. 56 (1980).

II. Suspension of Proposed and Final Regulations

The order requires executive agencies (1) to suspend the effective date of rules that have been issued as final rules, but have not become legally effective; and (2) to reconsider rules that are proposed but have not yet been made final. After suspension of final rules, agencies must reconsider all such rules in accordance with the order. These requirements are imposed only "to the extent permitted by law" and are thus inapplicable when a judicial or statutory deadline requires prompt action. Moreover, agencies must, in complying with these directives, adhere to the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706, and all other laws.

For rules that have not yet been made final, the APA imposes no special procedural requirements. Agencies need not follow the notice and comment procedures of 5 U.S.C. § 553, for nothing in that provision requires an agency to allow a period for comment on a decision to delay final adoption of a proposed rule. The agency's decision may, however, be subject to judicial review, and the agency may have to furnish a reasoned explanation for that decision. *See ASG Indus.* v. *Consumer Prod. Safety Comm'n*, 593 F.2d 1323, 1335 (D.C. Cir. 1979); *Action for Children's Television* v. *FCC*, 564 F.2d 458, 478-79 (D.C. Cir. 1977). The explanation here—that the agency needs time to prepare an RIA required by executive order—is, we believe, sufficient.

The second category of regulations covered by the executive order raises somewhat different legal issues. Under 5 U.S.C. § 553(b), notice and comment procedures must be followed for "rule making" unless "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). Under 5 U.S.C. § 551(5), the term "rule making" is defined as "agency process for formulating, amending, or repealing a rule." The initial question, then, is whether an agency's decision to "suspend" a final but not effective rule is "rule making" which triggers the procedural safeguards of § 553.

In a recent memorandum, this Office concluded that a 60-day suspension of the effective date of a final rule should not, in general, be regarded as rulemaking within the meaning of the APA.[9] We based our conclusion on "the clear congressional intent to give agencies discretion to extend the effective date provision beyond 30 days" and the absence of statutory language or history suggesting "that a delay in effective date is the sort of agency action that Congress intended to include within the procedural requirements of § 553(b)." Nevertheless, we believe that a short-term suspension of the effectiveness of a final rule is not the equivalent of an indefinite suspension coupled with a process designed to review the basis for the rule, with a view to establishing a new rule. Although the former seems fairly characterized as a mere extension of an effective date under § 553(d), the latter should probably be characterized as "agency process for formulating, amending, or repealing a rule" for purposes of § 553(b).

The difference between these two measures for purposes of § 553 becomes clear upon examination of the sequence of events that is expected to take place under each of them. Under the President's Memorandum of January 29, 1981, 46 Fed. Reg. 11227 (1981), "Postponement of Pending Regulations," agencies are to defer the effective dates of final rules for 60 days in order to review them. The completion of that review will point to either of two dispositions. The rule might be allowed to take effect as published in final form, or it might be withdrawn for some proposed change. The first disposition would require no new procedures. The second disposition would surely contemplate an amendment or repeal of the earlier rule subject to § 553's public procedures, but the earlier deferral of the rule's effective date would remain just that.[10]

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[9] Memorandum Opinion of January 28, 1981, for Honorable David Stockman, Director, Office of Management and Budget, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel. [Note: The January 28, 1981, memorandum opinion *(Presidential Memorandum Delaying Proposed and Pending Regulations)* appears in this volume at p. 55, *supra.* Ed.]

[10] Admittedly, one of the purposes of the 30-day effective date provision is to allow agencies to correct errors or oversights in final regulations. *See Final Report of the Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies,* S. Doc. No. 8, 77th Cong., 1st Sess., 114–15 (1941); *Sannon* v. *United States,* 460 F. Supp. 458, 467 (S.D. Fla. 1978). This purpose, however, does not suggest that agencies may make corrections, let alone withdraw rules, during the period between a rule's publication and its effective date without offering public procedures or showing good cause for dispensing with them. Proposed corrections—or even repeals—would of course be amendments for purposes of § 553(b).

Under the proposed order, the situation is analogous to the second possible disposition under the President's Memorandum. The order, by requiring careful cost-benefit analysis of rules through the RIA process, would contemplate notices of proposed rulemaking on the preliminary RIA and a reexamination of the rule at the appropriate time. The issue to be decided at the time the rule is suspended indefinitely for the order's process to take place is whether the rule, which has already been promulgated in final form, should be allowed to have interim effect while it is under review by the agency. We believe that this decision is one of "formulating, amending, or repealing a rule" that requires either notice and comment procedures or good cause for dispensing with them under § 553(b). Admittedly, the difference between a short deferral of the effectiveness of a rule and an indefinite suspension for reexamination is in part one of degree. But there is also a difference in kind: once a decision to begin the process of amending a rule is made, there is no longer a plausible argument that a rule that was to take effect is merely to be delayed for a brief period.

Notice and comment procedures on the issue of the interim effectiveness of a rule that is due to undergo reexamination under the order should take the following form. The agency should defer the rule's effective date for a period sufficient to allow a short time for notice and comment, an opportunity for the agency to consider the comments and decide the issue of interim effectiveness, and an interval before the rule takes effect sufficient to meet the purposes of § 553(d).

In deciding on the interim effectiveness of final rules subject to the order's procedures, the final question is whether and under what circumstances agencies will have good cause to dispense with notice and comment procedures. Public procedures on interim effectiveness might be "unnecessary, impracticable, or contrary to the public interest," where the question whether there should be any rule at all was fully ventilated in the rule's comment process, or where it is clear that interim effect could impose substantial but short-term compliance costs. On the other hand, notice and comment might be needed where the rule's proponents had advanced substantial arguments for its early effectiveness, and where compliance costs are not likely to be wasted.

Such arguments must, of course, be assessed on a case-by-case basis. If the available record indicates that the costs of the rule at issue are not substantial and that the failure to allow the rule to become effective may itself be controversial, the likelihood that a court will require notice and public comment increases. The procedural requirements of the APA will, therefore, vary with the size and immediacy of the burdens imposed by the rule and the need for public comment on a decision to withdraw a final but not effective rule.

III. Regulatory Review by Agency Heads

Section 4 of the proposed order would require agency heads to make express determinations that regulations they issue are authorized by law and are supported by the materials in the rulemaking record. These requirements are meant to assure agency compliance with existing legal principles that rules must be authorized by law, and that they should be adequately supported by a factual basis. Accordingly, we find no legal difficulty with them. In particular, they do not purport to change generally applicable statutory standards for judicial review of agency action, *see* 5 U.S.C. § 706, and could not have such an effect. They also do not purport to alter any specially applicable standards, such as those concerning the evidentiary standard that must be met to uphold a given rule, appearing in statutes governing a particular agency.

On the other hand, the section would add the significantly new procedural requirements that agency heads expressly determine that the legal and factual requisites for a rule have been met. The first requirement reflects the principle, central to administrative law, that agency action must be guided by the "supremacy of law." *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 84 (1936) (Brandeis, J.). This principle protects against excess of power and abusive exercise of power by administrators. *See Final Report of the Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies,* S. Doc. No. 8, 77th Cong., 1st Sess. 76 (1941). The requirement that agency heads determine that a rule has "substantial support" in the materials before the agency means that a rule's necessary factual basis must be found to exist. This second requirement should not be confused with a "substantial evidence" standard of judicial review, which could be imposed only by statute. It embodies Recommendation 74–4 (subpart 3) of the Administrative Conference of the United States, 1 CFR § 305.74.4, which urges that for a rule to be considered rational, it should be adequately grounded in a factual basis. This requirement is consistent with the approach of courts that have carefully reviewed agency action under the "arbitrary" and "capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706 (2)(A). *See, e.g., Ethyl Corp.* v. *EPA,* 541 F.2d 1 (D.C. Cir.) (*en banc*), *cert. denied,* 426 U.S. 941 (1976).

IV. Judicial Review

The order states that it is not intended to create any rights or benefits enforceable by a party to litigation against the United States, its agencies, or any other person. At the same time, it provides that determinations of costs and benefits, and the RIA itself, are meant to form part of the agency record for purposes of judicial review. The effect of this provision is to preclude direct judicial review of an agency's compliance with the order. The provision makes clear the President's intention not to create private rights, an intention that should be controlling here. *See Independent Meat Packers Ass'n* v. *Butz*, 526 F.2d 228 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976) (no judicial enforcement of executive order requiring consideration of inflationary impact of regulations, in part because such order had not been issued pursuant to delegation from Congress); *Legal Aid Soc'y of Alameda County* v. *Brennan*, 608 F.2d 1319 (9th Cir. 1979) (judicial review available of compliance with an executive order that had been ratified by Congress). Even without the provision, compliance with the order would probably be immunized from review because the order has not been promulgated pursuant to a specific grant of authority from Congress to the President and thus lacks the "force and effect of law" concerning private parties. *See Independent Meat Packers Ass'n* v. *Butz*, 526 F.2d 228; *National Renderers Ass'n* v. *EPA*, 541 F.2d 1281, 1291–92 (8th Cir. 1976); *Hiatt Grain & Feed, Inc.* v. *Bergland*, 446 F. Supp. 457, 501–02 (D. Kan. 1978). The bar on judicial review of agency compliance with the order does not, of course, prohibit a court from hearing a constitutional or statutory attack on the legality of the order itself or of agency action taken pursuant to its requirements.

Because the regulatory impact analysis that will be required by the order will become part of the agency record for judicial review, courts may consider the RIA in determining whether an agency's action under review is consistent with the governing statutes. This, of course, is true of all matters appearing in the rulemaking record.

V. Conclusion

The proposed executive order is acceptable as to form and legality.

Larry L. Simms
Acting Assistant Attorney General
Office of Legal Counsel

Use of Technical Advisers by Board of Contract Appeals

A governmental decisionmaking body, including an agency board of contract appeals, may employ technical advisers to analyze and make recommendations on the technical aspects of evidence. Where a decisionmaker properly uses technical advisers, their reports and recommendations need not be disclosed to the parties to the proceedings; however, where the advice of technical advisers adds new facts to the record or constitutes evidence in itself, a court may require that it be disclosed.

February 27, 1981

MEMORANDUM OPINION FOR THE CHAIRMAN, GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS

This responds to your inquiry concerning the proposal of the General Services Administration Board of Contract Appeals (Board) to hire technical staff members with engineering and technical experience who would be full-time employees of the Board. Their function would be to respond to technical inquiries of the Board members in connection with cases pending before the Board and to explain to them technical aspects of the evidence where needed. We understand that it is intended to model the relationship between the technical advisers and the Board members after the one prevailing between the Court of Claims and its auditors and that it is not intended to make the reports of the technical advisers available to the parties.[1]

The functions and powers of your Board may be briefly described as follows: According to Section 6(a) of the Contract Disputes Act of 1978 (Act), 41 U.S.C. § 605(a), all disputes arising from government procurement contracts are to be submitted to a contracting officer. The agency boards of contract appeals, established pursuant to § 8(a) of the Act, 41 U.S.C. § 607(a), have jurisdiction to hear and determine appeals from the decisions of the contracting officers. The boards may grant the same relief that is available to a litigant asserting a contract claim in the Court of Claims. Section 8(d) of the Act, 41 U.S.C. § 607(d). The ruling of the boards may be appealed to the Court of Claims. Section 10(a)(1) of the Act, 41 U.S.C. § 609(a)(1). In that court the decisions of the boards on any question of law are not final or conclusive, "but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence." Section 10(b) of the Act, 41 U.S.C. § 609(b). Section 10(a)(1) of the Act, 41 U.S.C. § 609(a)(1), permits a contractor dissatisfied with the decision of a contracting officer to bypass the board and to bring an action directly in the Court of Claims.

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[1] In this context we recommend that you examine the pertinent rules and internal regulations of the Court of Claims and of the Court of Customs and Patent Appeals and adapt them to the requirements of your Board.

Your inquiry raises two questions. First, whether a decisionmaking body may use assistants who will explain to it technical aspects of the evidence, and, second, whether those explanations may be withheld from the parties to the proceedings. The first question can be confidently answered in the affirmative. As to the second one, it is our conclusion that basically the technical explanations of the type outlined in your letters need not be disclosed to the parties. As a practical matter, however, the line of demarcation between technical advice and the introduction of new facts or of opinion evidence may be very narrow and may depend on the form in which the explanation or advice has been given and the perspective in which the court chooses to evaluate it. Consequently, there may be situations in which a party to the proceedings will be able to obtain disclosure of the technical explanation.

I.

It has been established, at least since *Morgan* v. *United States*, 298 U.S. 468, 481 (1936) (*Morgan I*), that a decisionmaker may utilize assistants to sift and analyze the evidence and to prepare summaries and to make recommendations.[2] In *Richardson* v. *Perales*, 402 U.S. 389 (1971) the Court saw nothing "reprehensible" in the employment by the Social Security Administration of medical advisers who were to explain medical problems and evidence to the lay administrative law judges in a manner very similar to that envisaged by your Board. 402 U.S., at 408. In *Perales*, however, the medical adviser was called as a witness and was cross-examined. *Id.* at 396. The case therefore does not resolve the second issue raised by your inquiry.[3]

Hence, if the Board has the necessary budgetary authority to employ technical advisers and in the absence of any other statutory prohibition, there appears to be no objection to their employment. This initial conclusion, however, does not mean in itself that the advice given, or explanations made, by the technical advisers may be withheld from the participants to the proceedings.

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[2] *See also, e.g., Braniff Airways, Inc.* v. *CAB*, 379; F.2d 453, 461 (D.C. Cir., 1967); *Montrose Chemical Corp. of California* v. *Train*, 491 F.2d 63, 68 (D.C. Cir., 1974); *KFC National Management Corp.* v. *NLRB*, 497 F.2d 298, 304–5 (2d Cir., 1974), *cert. denied*, 423 U.S. 1087 (1976).

[3] An analogous situation arose in *McDaniel* v. *Celebrezze*, 331 F.2d 426 (4th Cir., 1964). There the administrative agency did not use a technical adviser for the explanation of technical terms, but utilized medical texts to "expand and explain" medical reports and opinions. *Id.* at 427–28. The court upheld the practice because claimant was given an opportunity to challenge and contradict the publications used by the agency. *Id.* at 428–29.

II.

According to *Morgan* v. *United States*, 304 U.S. 1, 18 (1938) (*Morgan II*) and *United States* v. *Morgan*, 313 U.S. 409, 422 (1941) (*Morgan IV*), it is not the function of the courts to probe the mental processes by which a decisionmaker reached his conclusion. From this the courts have deduced that where a decisionmaker properly uses assistants as authorized by *Morgan I, supra*, and in the absence of a *prima facie* showing of misconduct,[4] the summaries, reports, or recommendations of the assistant based on the evidence and utilized by the decisionmaker need not be disclosed to the parties to the proceedings, for to do so would impermissibly probe the mental processes leading to the decision. *See, e.g., Montrose, supra*, 491 F.2d at 69-70; *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 675 (1st Cir., 1974); *Kent Corp.* v. *NLRB*, 530 F.2d 612, 620–21 (5th Cir., 1976), *cert. denied* 429 U.S. 920 (1976). This immunity from disclosure, however, presupposes, as is sometimes implied and occasionally spelled out in these court decisions, that the advice or explanation is based exclusively on the record, and does not add any new facts or constitute evidence in itself. Thus, in two cases the denial of access to advice received by a decisionmaker was specifically predicated on the circumstance that the advice was based exclusively on the evidence in the record and did not constitute evidence. *Montrose, supra*, 491 F.2d at 65, 70; *Coppenbarger* v. *Federal Aviation Administration*, 558 F.2d 836, 840 (7th Cir., 1977).

The crux in this area is that it is frequently difficult to determine whether the advice or explanation given by a technical adviser is indeed based exclusively on the facts contained in the record; whether it utilizes extraneous facts, or otherwise constitutes opinion evidence or the taking of official notice, which generally must be made available to the participants. The ultimate decision therefore frequently depends on the evaluation of the advice by the courts and on the form in which it was given.

In *Doe* v. *Hampton*, 566 F.2d 265 (D.C. Cir., 1977), an employee had appealed her dismissal to the Civil Service Commission. The record before the Commission indicated that the employee was schizophrenic. *Id.*, at 268. During the review of the record, the Civil Service Commission Appeal Examining Office asked a doctor employed by the Commission whether the diagnosis contained in the record would make the employee a hazard to herself or others. The doctor replied that "suicide and homicide are of danger in schizophrenia, and it is a most difficult assessment to make as to the possibility or probability of their being a hazard to themselves or others." *Id.* at 270. The court described the Office's inquiry and the doctor's advice to the effect that the Office sought and received a doctor's "additional medical opinion." *Id.* The court concluded that the Appeal Examining Office had introduced further medical opinion evidence in the record, and rejected the argument that the Office had merely obtained assistance in evaluating existing record evidence. *Id.* at 276. Consequently, it held that the discharged employee had the right to see and comment on the doctor's "opinion." *Id.* at 277. It may be suggested that the doctor's response properly could have been characterized as an explanation to the lay officials in the Appeal Examining Office of the existing record evidence, in particular, of the technical term "schizophrenia" and of its normal implications to doctors.[5]

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[4] *See, e.g., Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971); *Singer Sewing Machine Co.* v. *NLRB*, 329 F.2d 200, 208 (4th Cir., 1964); *KFC National Management Corp.* v. *NLRB*, *supra*, 497 F.2d at 305; *Abbott Laboratories* v. *Harris*, 481 F. Supp. 74, 78 (N.D. Ill., 1979).

Ralpho v. *Bell*, 569 F.2d 607 (D.C. Cir., 1977), *rehearing denied*, 569 F.2d 636 (1977), indicates the importance of the form in which the advice is given. That case sought the review of a damage award by the Micronesian Claims Commission. It involved, like many other proceedings pending before the Commission, the valuation of property destroyed in Micronesia during the hostilities of World War II. Since the proceedings before the Commission took place about 30 years after the damages had been suffered, that valuation was complicated by the passage of time. Additional problems were presented by the primitive, non-monetary economy prevailing in Micronesia while it was under Japanese domination between the two World Wars. The court described the Commission's method of dealing with those difficulties as follows:

> To facilitate disposition of claims, then, the Commission conducted interviews and examined records of various sorts in order to get a composite picture of the average wartime values of goods and services in Micronesia. The results of this survey were assembled in a guide about 40 pages in length, resembling a price list, which was frequently updated and expanded as the need arose. In its 1973 annual report, the Commission explained that the study was consulted "in the absence of better evidence" on the issue of value and that sparse presentations by claimants often made such consultation necessary.

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[5] Significantly, the court held that the failure to make the doctor's advice available to the claimant was not prejudicial error, because the evidence generated by that advice was "merely cumulative." *Id.* at 277–78. This ultimate disposition of the case suggests strongly that the doctor's advice was essentially an explanation of existing technical evidence, rather than additional opinion evidence.

Id. at 614 (footnote omitted). The court concluded that the value study constituted evidence; hence, that the claimant should have been afforded the opportunity to inspect and comment on it. *Id.* at 628.

It is suggested that a procedure could have been developed under which the Commission would have received from technical advisers explanations of the evidence on the record regarding the value of the claimant's property and that a court could have considered those explanations to be the Commission's internal work product to which the parties to the proceeding are not entitled under the *Morgan* cases, *supra*, and their progeny.

III.

We finally reach the question whether, if your proposal were adopted, there would be a serious risk of a judicial ruling to the effect that the litigants have the right to inspect and to rebut or comment on the technical staff members' advice. To begin with, the decisions of your Board are reviewable in the Court of Claims,[6] and we believe it is unlikely that that court will disapprove a procedure patterned after the one prevailing in it, provided, of course, that the Board will indeed follow that procedure.

There is, of course, the possibility that a litigant will seek the information through discovery or a request filed under the Freedom of Information Act. Still, in view of the presumption of administrative regularity, *Singer Sewing Machine Co., supra,* 329 F.2d at 208, a litigant is not generally entitled to the disclosure of the information absent a *prima facie* showing of irregularity or misconduct. *Singer Sewing Machine Co., ibid; KFC National Management Corp., supra,* 497 F.2d at 305; *South Terminal Corp.* v. *EPA, supra,* 504 F.2d at 675.[7] Hence, the litigant, being unable to get access to, or being unaware of, the staff member's advice,[8] will not normally be able to make the required *prima facie* showing that the advice was irregular or tainted with misconduct. Nevertheless, we believe that we have to advise you that the employment of the technical staff members in the manner envisaged by your Board involves a limited, but still not inconsequential, litigation risk.

LARRY L. SIMMS
Acting Assistant Attorney General
Office of Legal Counsel

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[6] Contract Disputes Act of 1978, § 8(g), 41 U.S.C. § 607(g).

[7] Exemption 5 to the Freedom of Information Act, 5 U.S.C. § 552(b)(5) (internal memoranda), does not state in express terms that it is inapplicable where the internal communication is tainted with irregularity or misconduct. *Montrose, supra,* however, suggests strongly that the court would not have applied the exemption in that case if the advice given to the agency had included facts that were not on the record. *See also Kent Corp.* v. *NLRB, supra,* 530 F.2d at 621, n.21.

[8] In some cases the parties were alerted to the existence of the advice by a reference to it in the agency's decision or elsewhere. *See, e.g., Hampton, supra,* 566 F.2d at 270; *Ralpho, supra,* 569 F.2d at 614.

Government Attorneys' Participation as Plaintiffs in a Suit Against the Office of Personnel Management

Assistant United States Attorneys (AUSAs) are not barred by 18 U.S.C. § 205 from participating as plaintiffs in a class action suit challenging the authority of the Office of Personnel Management (OPM) to reduce the cost of living allowance paid to all federal employees in Alaska, though they may not accept any compensation for assisting in prosecuting the claims of the class or act as agents or attorneys for the class.

The AUSA's duty of loyalty to a client under applicable standards of professional conduct does not preclude his joining a suit against OPM, but he should avoid taking an active or notorious role in the litigation.

March 9, 1981

MEMORANDUM OPINION FOR AN ASSISTANT UNITED STATES ATTORNEY, DISTRICT OF ALASKA

This responds to your request for our opinion concerning the professional propriety of Assistant United States Attorneys (AUSAs) participating as plaintiffs in a class action lawsuit against the Office of Personnel Management (OPM). We understand that the suit would involve the authority of OPM to reduce the cost-of-living allowance paid to all federal employees in Alaska. You have advised us that none of the plaintiff AUSAs has any privileged government information that is relevant to the lawsuit, and that no government employee will act as agent or attorney for the plaintiff class. Under those circumstances, we conclude that the AUSAs may properly participate as members of the plaintiff class. However, we must advise you to avoid taking an active or notorious role in organizing or conducting the litigation, and to refuse any compensation for assisting in the lawsuit.[1]

The pertinent conflict of interest statute is 18 U.S.C. § 205. Section 205 contains two restrictions that will apply to your situation. (1) It prohibits Executive Branch employees from receiving any gratuity, share, or interest in any claim[2] against the United States in consideration for assistance in the prosecution of the claim, and (2) it prohibits Executive Branch employees from acting as agent or attorney for anyone[3] in connection with any particular matter in which the United States is a party. The first clause of the statute prohibits you from accepting any compensation for assisting in prosecuting the claims of the class. The second clause of the statute prohibits you from serving as agents or attorneys for the class.[4] Generally, this is interpreted to prohibit representational activity such as appearances in court, signing pleadings or letters, and direct contact with a federal agency on behalf of the class. Should you desire a more detailed explanation of the meaning and scope of the statutory term "act as agent or attorney," you should consult Manning, *supra* at p. 83, and 5 C.F.R. 737.5(b) (1) and (2).

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[1] We recognize that these restrictions may make it impossible for you to serve as class representatives in the lawsuit. Since you have indicated that you do not intend to serve as class representatives, we need not explore this possibility further.

In addition to the statutory restrictions, your professional responsibilities to a client agency may also constrain your activities in connection with the lawsuit. The Justice Department's Standards of Conduct incorporate by reference the Code of Professional Responsibility of the American Bar Association (Code). *See* 28 C.F.R. 45.735-1. The Code contains several principles that limit the activities that lawyers may undertake to the detriment of their clients.[5]

Canon 4 of the Code prohibits a lawyer from using a confidence or secret of a client to the disadvantage of the client. DR 4-101(B)(2). Canon 5 exhorts lawyers to avoid compromising influences and loyalties, including personal interests that may dilute their loyalty to their clients. *See* EC 5-1. Ordinarily, the principles of loyalty and confidentiality embodied in Canons 4 and 5 preclude a lawyer from acting as an advocate against a client, even if the litigation is wholly unrelated. For example, a lawyer should not ordinarily agree to represent someone in a tort action against a person for whom he is preparing an estate plan.

There are, however, circumstances where a lawyer may act as advocate against a client. The discussion draft of the ABA's proposed revision of its standards of conduct describes one situation where a lawyer might properly sue his client:

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[2] We do not have sufficient information to determine whether your anticipated lawsuit would constitute a "claim" against the United States. The term is not defined in the conflict of interest statute, but there is little doubt that the term covers at least suits seeking direct monetary relief from the United States. For a discussion of the possible breadth of the term, *see* Manning, Federal Conflict of Interest Law (1964) at pp. 85-88. We will assume hereafter that your lawsuit constitutes a claim within the meaning of the statute.

[3] In the past, this Office has taken the position that § 205 does not prohibit self-representation. However, in a suit, such as a class action, where there are multiple parties with claims that are virtually identical to the employee's claim, we read the statute to preclude the employee from participating as agent or attorney.

[4] There is an exception to this prohibition for "personnel administration proceedings," but we need not determine whether your case would fit that exception because you do not intend to serve as agents or attorneys.

[5] For these purposes, you should consider OPM to be your "client," since your Office represents OPM on a continuing basis. We understand that, with one exception, all of the AUSAs in your Office handle civil cases for the client agencies.

> For example, a lawyer engaged in a suit against a large corporation with diverse operations may accept employment by the corporation in an unrelated matter if doing so will not affect the lawyer's conduct of the suit and if both the litigant and the corporation consent upon adequate disclosure. Whether concurrent representation is proper can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

Draft dated January 30, 1980, at p. 29. Another situation is recognized explicitly in the current Code—the suit by a lawyer to collect his fee. *See* DR 4-101(C)(4). In our view, the same considerations would make it proper for a government lawyer to sue his client/employer over conditions of employment.[6] Accordingly, we conclude that you may be members of a plaintiff class in an action against OPM concerning the level of the cost-of-living allowance.

Although your duty of client loyalty will not prevent you from joining a suit against OPM, we do believe that it should caution you against taking an active or notorious role in the litigation. In particular, you should avoid organizing or encouraging others to join the suit or to bring similar suits against your client. Finally, your Office should take steps to ensure that OPM is adequately represented in the lawsuit by other Department of Justice counsel.

Larry L. Simms
Acting Assistant Attorney General
Office of Legal Counsel

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[6] Congress has provided for suits by federal employees against their federal employer in a variety of contexts. *See, e.g.*, 42 U.S.C. § 2000e-16.

Jurisdiction of the Office of Special Counsel, Merit Systems Protection Board, Under 5 U.S.C. §§ 1206(b)(2) and (7)

The Office of Special Counsel, Merit Systems Protection Board, has no authority under 5 U.S.C. §§ 1206(b)(2) and (7), to require another agency to submit a report concerning allegations of misconduct not made by a federal employee or an applicant for federal employment.

March 13, 1981

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, NUCLEAR REGULATORY COMMISSION

This responds to your request for an opinion concerning the authority of the Office of Special Counsel (OSC), Merit Systems Protection Board, under 5 U.S.C. §§ 1206(b)(2) and (7). In particular, you ask whether the Office of Special Counsel is empowered under those provisions to require the Nuclear Regulatory Commission (NRC) to submit a report to it on a joint complaint by a private organization and a private individual alleging NRC mismanagement and gross waste at a nuclear power facility in Ohio.

It will be helpful to mention, as background, certain statutory responsibilities of OSC before we turn to 5 U.S.C. §§ 1206(b)(2) and (7). Section 1206(a)(1) authorizes it to receive and investigate allegations of the occurrence of any of the prohibited personnel practices listed in 5 U.S.C. § 2302(b), one of which is a superior's taking or failing to take a personnel action against a subordinate employee or an applicant for employment as a reprisal for "whistleblowing." *See* 5 U.S.C. § 2302(b)(8).

Section 1206(b)(1) places a restraint on OSC for the benefit of whistleblowers. It provides as follows in pertinent part:

> (b)(1) In any case involving—
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> * * * * *
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> (B) a disclosure by an employee or applicant for employment to the Special Counsel of the Merit Systems Protection Board . . . of information which the employee or applicant reasonably believes evidences—
>
> (i) a violation of any law, rule, or regulation; or

> (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
>
> the identity of the employee or applicant may not be disclosed without the consent of the employee or applicant during [certain investigations] unless the Special Counsel determines that the disclosure . . . is necessary . . .

Section 1206(b)(2) and the pertinent part of § 1206(b)(7) read as follows:

> (2) Whenever the Special Counsel receives information of the type described in paragraph (1) of this subsection, the Special Counsel shall promptly transmit such information to the appropriate agency head.
>
> (7) Whenever the Special Counsel transmits any information to the head of the agency under paragraph (2) of this subsection . . . the head of the agency shall, within a reasonable time after the information was transmitted, inform the Special Counsel, in writing, of what action has been or is to be taken and when such action will be completed . . . .

It appears that the occurrence which gave rise to your request for an opinion was OSC's transmittal to NRC "pursuant to the provisions of 5 U.S.C. § 1206(b)(2)" of a letter stating that a private citizen and a private organization had charged certain NRC employees with misconduct of a kind specified in § 1206(b)(1)(B)(ii) at a certain nuclear power facility. The letter requested NRC to submit a report "pursuant to 5 U.S.C. § 1206(b)(7)." OSC made the request in accordance with its understanding that the words of § 1206(b)(2), "information of the *type* described in paragraph (1) of this subsection" (emphasis added), require only its antecedent receipt of evidence of an offense listed in § 1206(b)(1) and do not require also that the evidence come from a federal source. In your letter to this Office, you take the position that OSC does not have authority to obtain the report from NRC because the antecedent allegations of misconduct were not made by a federal employee or applicant for federal employment. For the following reasons, we concur in your position.

An examination of the legislative history of the Civil Service Reform Act of 1978, which created OSC, has revealed nothing to suggest that Congress had in mind the construction of § 1206(b)(2) that OSC follows. To the contrary, Senator Patrick J. Leahy, the sponsor of an amendment on the floor of the Senate that, among other things, introduced the provisions of what are now §§ 1206(b)(2) and (7) into the Act, placed a contrary intent on record. Upon introducing the amendment, which the Senate approved without objection, he submitted a supporting statement signed by him and 16 colleagues that contained the following:

> When the Senate considers S. 2640, the Civil Service Reform Act, we intend to offer an amendment to strengthen the whistleblower protections. This proposal will assure that the charges raised by whistleblowers—those *federal employees* who disclose illegality, waste, abuse, or dangers to public health or safety—are fully investigated. We ask you to join with us in establishing a mechanism for the handling of whistleblower complaints which will result in the systematic weeding out of wronged [sic] from the federal service.
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> Although *employees* are free, under the committee's bill, to publicly disclose impropriety, no dissent channel is established so that employees can seek internal resolution of allegations. Our amendment seeks to assure that *employees* have a safe place to go outside their agency where their allegations will be taken seriously. We hope to encourage *employees* to give the government the first crack at cleaning its own house before igniting the glare of publicity to force correction. We do not want to limit the *employees'* rights to speak out when they see wrongdoing; we do want to assure them that the government has a commitment to eliminating the wrongdoing.

124 Cong. Rec. 27,570–71 (1978) (emphasis added).

It is fair to say that these passages, which were not challenged at the time or later, manifested a clear understanding on the part of Congress that it was legislating only in relation to employees of the government. The passages therefore effectively dispose of OSC's claim of jurisdiction under §§ 1206(b)(2) and (7) in its letter to your agency.

A close reading of § 1206(b)(2) also militates against OSC's asserted authority. That paragraph must by its terms be read together with the language of § 1206(b)(1)(B) that describes a type of "information." The language is as follows: "information which the *employee or applicant* resonably believes evidences [a specified offense]." (emphasis added) Thus there is actually no give in § 1206(b)(2) to accommodate the interpretation that it permits OSC to transmit information to an agency head that has not been assessed by a federal whistleblower.

In sum, we are of the opinion that NRC is not required to furnish OSC the report it seeks.

LARRY L. SIMMS
Acting Assistant Attorney General
Office of Legal Counsel

Application of the Federal Water Pollution Control Act to the Former Panama Canal Zone

The Panama Canal Treaty and its implementing legislation make U.S. laws based on territorial jurisdiction, including the Federal Water Pollution Control Act, inapplicable to the former Panama Canal Zone. Both the Treaty negotiators and Congress expected environmental problems in the former Canal Zone to be dealt with jointly by the United States and Panama through the Joint Commission on the Environment.

March 17, 1981

MEMORANDUM OPINION FOR THE ASSISTANT LEGAL ADVISER FOR INTER-AMERICAN AFFAIRS, DEPARTMENT OF STATE

This responds to your request for our opinion whether the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 311 of § 1321, applies to the former Panama Canal Zone. The several agencies that have analyzed this question have reached contrary conclusions. We have reviewed the memoranda prepared by these agencies and independently reviewed the text of the Panama Canal Treaties [1] and related documents and legislation. For reasons set forth below, we conclude that the FWPCA does not apply to any portion of the former Canal Zone.

In the FWPCA, Congress declares that there should be no discharge of oil or hazardous substances into or upon "the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone," and imposes a civil penalty on any owner or operator of a vessel, on-shore facility, or off-shore facility from which oil or a hazardous substance is discharged. 33 U.S.C. § 1321(b). The President is authorized to remove discharged oil or hazardous substances and the party responsible for the discharge is liable for removal costs. 33 U.S.C. § 1321(c), (f), (g). The Administrator of the Environmental Protection Agency, the Secretary of the Department in which the Coast Guard is operating, the Council on Environmental Quality, and other officials are given responsibilities either directly by the Act or by delegation from the President. *Id.;* Executive Order No. 11,735 38 Fed. Reg. 21243 (1973). The Act is applicable only to navigable waters of the United States, adjoining shorelines, and waters of the contiguous zone.[2] The Act defines "United States" to include the Canal Zone; thus, prior to the Canal Zone's change in status, the Act clearly was applicable. The question here is whether the Panama Canal Treaty and implementing legislation render the Act inapplicable to the former Canal Zone.

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[1] Two treaties between the Republic of Panama and the United States were signed on September 7, 1977: the Panama Canal Treaty 33 U.S.T. ____, T.I.A.S. No. 10030, and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal. 33 U.S.T. ____, T.I.A.S. No. 10029. Hereinafter, references to the "Treaty" refer to the Panama Canal Treaty, unless otherwise specified.

We first examine the Treaty itself. Under the original 1903 treaty with Panama, the United States obtained the right to exercise plenary administrative and legislative jurisdiction over the Canal Zone as if the United States were sovereign over the Zone. 33 Stat. 2234, T.S. No. 431, (1903). The recent Treaty substantially alters this relationship. Under the Treaty, the Canal Zone itself loses its legal identification and Panama resumes administrative and legislative jurisdiction over the territory lying within the former Zone. The Treaty provides in Article XI, that "[t]he Republic of Panama shall reassume plenary jurisdiction over the former Canal Zone upon entry into force of this Treaty and in accordance with its terms." As territorial sovereign, Panama grants to the United States for the duration of the Treaty [3] "the rights necessary to regulate the transit of ships through the Panama Canal, and to manage, operate, maintain, improve, protect and defend the Canal." Thus, Panama grants to the United States the right to use, for these purposes, the various installations and areas including the Canal and its waters.

The Treaty deals less clearly with the question what law shall govern these areas. Paragraph 1 of Article IX of the Treaty specifies that the laws of the Republic of Panama shall apply in the areas made available for use of the United States, although paragraph 8 prohibits Panama from adopting any law or taking any action that would interfere with rights granted under the Treaty to the United States. Paragraph 7 of Article XI provides that "[t]he laws, regulations, and administrative authority of the United States . . . shall, to the extent not inconsistent with this Treaty, and related agreements, continue in force for the purpose of exercise by the United States of America of law enforcement and judicial jurisdiction only during the transition period."

Treaties are to be construed "with the highest good faith" with an eye to the "manifest meaning of the whole treaty." *Johnson* v. *Browne*, 205 U.S. 309, 321-22 (1907). Construing these Treaty provisions consistently and in keeping with the purpose of the Treaty, we conclude that the laws of the United States regarding water pollution are not applicable in the former zone.[4]

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[2] The "contiguous zone" is defined as "the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone." 33 U.S.C. § 1321(a)(9).

[3] The Treaty terminates on December 31, 1999. Art. II, ¶ 2.

In interpreting a treaty and other international agreements, the construction placed upon it by the Department charged with supervision of our foreign relations should be given much weight. *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961); *Factor* v. *Laubenheimer*, 290 U.S. 276, 294–95 (1933); *Sullivan* v. *Kidd*, 254 U.S. 433, 442 (1921). Here, the State Department consistently has taken the position that the FWPCA is inconsistent with, and thus superseded by, the Panama Canal Treaty. In connection with the hearings on ratification of the Treaty, the Secretary of State specifically listed the FWPCA, 33 U.S.C. § 1321(a)(5), as a statute that would be superseded by the Treaty.[5] In 1980, the State Department Legal Adviser's Office opined that "any laws of the United States based on territorial jurisdiction (such as the FWPCA) have become, by virtue of the Treaty, inapplicable in Panama." [6]

This interpretation of the Treaty is consistent with the Panama Canal Act of 1979 (Canal Act), 22 U.S.C. § 3601, legislation passed to implement the Treaty.[7] The Canal Act provides:

> Subject to the provisions of subsection (c) of this section, for the purposes of applying the . . . laws of the United States and regulations issued pursuant to such . . . laws with respect to transactions, occurrences, or status on or after October 1, 1979—
>
> (1) "Canal Zone" shall be deemed to refer to the areas and installations in the Republic of Panama made available to the United States pursuant to the Panama Canal Treaty of 1977 and related agreements; . . .

22 U.S.C. § 3602(b)(1). Subsection (c), referred to above, provides:

> Any reference set forth in subsection (b) of this section shall apply except as otherwise provided in this chapter or unless (1) such reference is inconsistent with the provisions of this chapter, (2) in the context in which a term is used such reference is clearly not intended, or (3) a term refers to a time before October 1, 1979.

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[4] It is true that repeals by implication are not favored and that a treaty will not be regarded as repealing an earlier statute by implication unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty. *Johnson* v. *Browne*, 205 U.S. 309, 321 (1907). Where there is such a conflict, however, it is resolved in accordance with the same rule of priority that governs the resolution of conflicts between statutes. The later in time prevails. *Cook* v. *United States*, 288 U.S. 102, 118–19 (1933).

[5] *Panama Canal Treaties: Hearings on Executive N Before the Committee on Foreign Relations*, 95th Cong., 1st Sess. 80–82 (1977).

[6] Letter from the Acting Assistant Legal Adviser for Inter-American Affairs to an attorney with the Federal Maritime Commission (August 15, 1980).

[7] The Act was intended by Congress to implement, and to be fully consistent with, the Panama Canal treaties. H.R. Rep. No. 94, 96th Cong., 1st Sess. (pt. I) 7–9 (1979).

22 U.S.C. § 3602(c). If subsection (b) were not qualified by subsection (c), one could interpret subsection (b) to require that the term "Canal Zone" in the FWPCA be read to refer to areas and installations in Panama made available to the United States pursuant to the Treaty and related agreements. These areas include the land and water areas encompassing a "continuous area generally following the course of the Panama Canal and generally contiguous to it . . . ,"[8] and thus the FWPCA would apply to the navigable waters of the Canal. Subsection (c), however, precludes application of this definition of "Canal Zone" if such reference is inconsistent with the Canal Act or if such reference clearly is not intended. Just as enforcement of the FWPCA in the Canal area would be inconsistent with the Treaty, so would it be inconsistent with the Canal Act. In our opinion, such a reference was not intended and the subsection (c) exception must be invoked.

As does the Treaty, the Act contains provisions which indicate it was not intended that the FWPCA would apply to the former Zone. The Panama Canal Commission, for example, was created as an agency of the Executive Branch to maintain and operate the Canal. Treaty, Art. III, ¶ 3; 22 U.S.C. § 3611. The Commission comprises both United States nationals and Panamanian nationals, with the Panamanians assuming increasing management responsibilities throughout the treaty period. The Annex to the Treaty specifically provides that "[i]t is understood that the Panama Canal Commission . . . may perform functions such as . . . protection of the environment by preventing and controlling the spillage of oil and substances harmful to human or animal life and of the ecological equilibrium in areas used in operation of the Canal and the anchorages." Treaty Annex, ¶ 3n. The authors thus contemplated that the Commission would be performing this function, not the Administrator of the Environmental Protection Agency or other United States officials. To draw these United States officials into the decisionmaking process by applying United States law could undercut the participation of Panamanian nationals and undermine the goal of having Panamanian policymakers, managers, and employees in place and fully prepared to assume the responsibilities that will devolve upon Panama when the Treaty terminates. *See* H.R. Rep. No. 94, 96th Cong., 1st Sess. (pt. IV) 13 (1979).

Another indication that both the treaty negotiators and Congress expected environmental problems to be dealt with jointly by the United States and Panama is the creation of a Joint Commission on the Environment. Treaty, Art. VI, ¶ 2; 22 U.S.C. § 3616. This Commission, established with equal representation from the United States and Panama, recommends to the two governments ways to avoid or to mitigate adverse environmental impacts. Article VI, ¶ 1 of the Treaty explains the underlying policy:

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[8] Treaty, Art. III, ¶ 2(a); Treaty, Agreement in Implementation of Article III (Sept. 7, 1977), 33 U.S.T. ——, T.I.A.S. No. 10031, Art. III, ¶ 1 and annex A, ¶ 1(a)(i).

> The United States . . . [and] Panama commit themselves to implement this Treaty in a manner consistent with the protection of the natural environment of the Republic of Panama. To this end, they shall consult and cooperate with each other in all appropriate ways to ensure that they shall give due regard to the protection and conservation of the environment.

In authorizing the establishment of the Joint Commission on the Environment, the House Committee on Foreign Affairs stated its intent that "the [Commission] be broad enough to deal with the entire range of environmental issues which might arise anywhere within the Panama Canal Watershed region." H.R. Rep. No. 94, 96th Cong., 1st Sess. (pt. I) 12–13 (1979).

Attempting to apply the FWPCA to the Canal area after passage of the Canal Act also would raise jurisdictional problems. The FWPCA provides that in cases under the Act arising in the Canal Zone, actions may be brought in the United States District Court for the District of the Canal Zone. 33 U.S.C. § 1321(n). Yet under the Canal Act and the Treaty, jurisdiction of the courts of the United States functioning in the former Canal Zone is severely restricted and would not include jurisdiction over new suits arising out of the FWPCA. *See* Treaty, Art. XI, ¶ 5; 22 U.S.C. § 3841(a).[9]

Throughout the legislative history of the Canal Act, there are references to the fact that United States territorial jurisdiction over the Panama Canal area has ceased. With respect to the redefinition of the Canal Zone quoted above,[10] the House Committee on Foreign Affairs wrote:

> Notwithstanding section 2(c)(1)(A) of the bill, as reported, which establishes the general rule that laws of the United States presently applicable in the Canal Zone will continue to apply to areas and installations made available to the United States pursuant to the Panama Canal Treaty, laws which are presently applied to the Canal Zone on the basis of territorial jurisdiction of the United States

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[9] We note also that the Treaty Concerning Permanant Neutrality and Operation of the Panama Canal contains a provision that as a pre-condition of transit, vessels may be required to establish the financial responsibility and guarantees for payment of damages resulting from acts or omissions of such vessels when passing through the Canal, "consistent with international practices and standards." Treaty Concerning Permanent Neutrality, *supra*, Art. III, ¶ 1(d). If the FWPCA applied to the Canal area during the period of management by the United States, the Treaty provision referred to above would conflict with 33 U.S.C. § 1321(p), which requires large vessels carrying oil or hazardous substances to establish and maintain, under applicable federal regulations, evidence of financial responsibility in set amounts.

[10] 22 U.S.C. §§ 3602(b), (c).

> over the zone will continue to apply in these areas and installations *only* for the purpose of exercising authority vested in the United States by the Treaty and related agreements. This limited application of the U.S. law is necessitated by the termination of the U.S. territorial jurisdiction effected by the Treaty.

H.R. Rep. 94, 96th Cong., 1st Sess. (pt. I) 12 (1979). The House Committee on Merchant Marine and Fisheries also emphasized that the laws of the United States, insofar as they are applicable by virtue of territorial jurisdiction of the United States in the Canal Zone prior to the Treaty, continue in force only for the purposes of exercising the authority vested in the United States by the Treaty. H.R. Rep. No. 98, 96th Cong., 1st Sess. (pt. I) 41 (1979). The specific phrase that referred to territorial jurisdiction was dropped from the final version of the bill, but there is no indication that Congress intended by this deletion to assert territorial jurisdiction over the canal areas. Certainly such an attempt would have provoked much debate.[11]

We note that at least one other agency, whose jurisdiction included the Canal Zone pursuant to a statutory provision similar to the FWPCA, has concluded that the law it administers no longer applies in the former Zone. The Zone was eligible for assistance under the Disaster Relief Act because § 102(4) of that Act, 42 U.S.C. § 5122(4), defines "State" to include the Canal Zone. The Federal Emergency Management Agency has determined, however, that the area formerly known as the Canal Zone is no longer eligible for disaster assistance: "With the ratification of the Panama Canal treaties this area became territory within the Republic of Panama on October 1, 1979, and is, therefore, excluded from assistance under the Disaster Relief Act of 1974." 44 Fed. Reg. 66,062 (1979).[12] The principle of harmony in statutory law dictates that, wherever possible, statutes should be construed consistently and harmoniously. *Hyrup* v. *Kleppe,* 406 F. Supp. 214, 217 (D. Colo. 1976); Sutherland Statutory Construction § 53.01 (Sands ed., 1973 & Supp. 1980).

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[11] The General Counsel's office of the Federal Maritime Commission has asserted that the FWPCA is not based solely on territorial jurisdiction and may be applied in areas that are not strictly part of the United States' territorial jurisdiction. Cited in support of this assertion is § 311(b)(1), 33 U.S.C. § 1321(b)(1), in which Congress declares that it is the policy of the United States that there should be no discharges:

> into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act or which may affect natural resources belonging to, appertaining to, *or under the exclusive management authority* of the United States . . . .

(Emphasis added, citations omitted.) The former Canal Zone fits into none of these categories, however. Given the unique nature of the responsibilities of the United States in operating the Canal under the treaty terms, and the participation of Panamanian nationals both on the Panama Canal Commission and the Joint Commission on the Environment, the waters of the Canal cannot accurately be said to be under the *exclusive* management authority of the United States.

[12] The Panama Canal Act of 1979 authorizes the Panama Canal Commission to expend appropriated funds to deal with emergencies. 22 U.S.C. § 3753.

For these reasons, we conclude that the FWPCA does not apply to any part of the former Canal Zone.

LARRY L. SIMMS
Acting Assistant Attorney General
Office of Legal Counsel

Constitutionality of Allowing Punishment of Misdemeanor by a Sentence Exceeding One Year

The Fifth Amendment to the Constitution requires that offenses punishable by imprisonment for more than one year be prosecuted by an indictment presented to a grand jury.

Proposed amendments to the Lacey Act, by which misdemeanor violations of the Act could result in up to five years' imprisonment if the defendant were designated a "special offender," must be construed to require prosecution by indictment in all cases.

March 30, 1981

MEMORANDUM OPINION FOR THE CHIEF, WILDLIFE SECTION, LAND AND NATURAL RESOURCES DIVISION

This responds to your request for our views regarding a proposed amendment to the Lacey Act (Act), 18 U.S.C. § 43. According to information you have provided us, the Safari Club International, an organization of "sportsmen," has proposed an amendment whereby criminal violations of the Act would be misdemeanors, unless the defendant were designated a "special offender." A court could sentence a "special offender" to a term of imprisonment up to five years. You have asked us to comment on the constitutionality of sentencing a defendant to a felony penalty when the underlying violation is a misdemeanor prosecuted by way of information rather than indictment. For reasons explained below, we conclude that such a statutory scheme would require that all offenses under the statute be brought before a grand jury.

The proposed amendment is patterned after the "dangerous special offender" criminal statute, which authorizes a prosecutor in a felony case to file a notice that the defendant is a "dangerous special offender." 18 U.S.C. § 3575(a). If, after the defendant is convicted by a plea of guilty or otherwise, it appears at a hearing the defendant is a "dangerous special offender," an increased penalty may be authorized. 18 U.S.C. § 3575(b). The proposed Lacey Act amendment in question here similarly would authorize an attorney prosecuting alleged violators of the Act to file a notice specifying that the defendant is a "special offender." A defendant could be adjudged a "special offender" if any one of three conditions is met: (1) the defendant has been convicted for three or more offenses involving illegal taking of fish and wildlife, or of plants; (2) the defendant committed the violation as part of a pattern of criminal conduct which constituted a substantial source of his income and in which he manifested special skill or expertise; or (3) the defendant was engaged in a conspiracy with five or more persons. Other than increasing the threshold requirements for special offender status, these categories are almost identical to the categories of § 3575(c).

The Fifth Amendment provides in part as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .

When faced with the necessity of defining the words "otherwise infamous crime," the Supreme Court in 1886 looked for the answer in English, Irish, and early American law, and concluded:

> [W]hether a man shall be put upon his trial for crime without a presentment or indictment by a grand jury of his fellow citizens depends upon the consequences to himself if he shall be found guilty.
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> * * * * *
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> . . . When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury.

Ex Parte Wilson, 114 U.S. 417, 423, 426 (1885). The Court decided that a crime punishable by imprisonment for a term of years at hard labor was an infamous crime within the meaning of the Fifth Amendment. *Id.* at 429. In a series of subsequent decisions, it was established that an infamous crime is one punishable by imprisonment in a penitentiary or at hard labor. *See United States* v. *Moreland,* 258 U.S. 433 (1922); *In Re Claasen,* 140 U.S. 200 (1891); *Mackin* v. *United States,* 117 U.S. 348 (1886). Since imprisonment in a penitentiary may be imposed only if a crime is punishable by imprisonment exceeding one year, 18 U.S.C. § 4083, the rule has come to be stated that a crime is infamous if it is punishable by imprisonment for more than one year. *See Duke* v. *United States,* 301 U.S. 492 (1937).

Rule 7(a) of the Federal Rules of Criminal Procedure gives effect to this Fifth Amendment requirement by providing:

> An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment . . . [unless waived].

The Rule does not enlarge the requirement of an indictment beyond the "capital, or otherwise infamous crime" of the Fifth Amendment. It simply incorporates the criteria which have been established by the Supreme Court. *Harvin* v. *United States,* 445 F.2d 675, 678 (D.C. Cir. 1971).

Applying these criteria to the question at hand, it is apparent that if the defendant qualifies for treatment as a "special offender," prosecution must be by indictment.[1] The closest analogy to this situation we found in decided cases is the lengthened sentence authorized for youthful offenders under the Youth Corrections Act, 18 U.S.C. §§ 5005–5025. Under that Act, a defendant under the age of 26 years may be committed to the custody of the Attorney General for a period up to six years, even if the offense for which he is convicted is a misdemeanor. 18 U.S.C. §§ 4216, 5010(b), 5017(c). Many defendants prosecuted by way of informations have challenged their convictions, alleging that they were entitled to grand jury indictments. Those cases which have held that an indictment is required include *United States* v. *Ramirez,* 556 F.2d 909 (9th Cir. 1976); [2] *United States* v. *Davis,* 430 F.Supp. 1263 (D. Haw. 1977; *United States* v. *Neve,* 357 F. Supp. 1 (W.D. Wisc. 1973), *aff'd,* 492 F.2d 465 (7th Cir. 1974); *United States* v. *Reef,* 268 F. Supp. 1015 (D. Colo. 1967). Conversely, the District of Columbia Circuit Court of Appeals ruled, in an *en banc* 6–4 decision, that an indictment is not necessary for prosecutions under the Youth Corrections Act. *Harvin* v. *United States,* 445 F.2d 675 (D.C. Cir. 1971). This ruling was based on the fact that the purpose of the extended sentence for a youthful offender was to insure proper treatment and was not a reflection of the prevailing views of society as to the infamous or non-infamous character of the crime. *Id.* at 678. It was also based on the court's finding that the Youth Corrections Act does not permit a sentence under it to be served in a penitentiary.[3] Neither of these bases is applicable to the proposed "special offender" amendment to the Lacey Act. The increased penalty would reflect societal judgment of the crime and the sentence probably would be served in a penitentiary.

Even as to a defendant who does not qualify as a "special offender," an indictment may be required. If a defendant under this proposed amendment did not satisfy one of the three conditions of "special offender" status noted above, he or she could be imprisoned no more than one year. The proposed amendment does not require, however, that the facts justifying such status be alleged in the charging document so the maximum sentence would not be initially apparent. Under somewhat different but analogous facts, the Supreme Court has required an indictment. In *Smith* v. *United States,* 360 U.S. 1 (1959), the petitioner was charged with a violation of the Federal Kidnapping Act, 18 U.S.C. § 1201, which was punishable by death if the victim was not liberated unharmed. He had waived indictment and was prosecuted by information. The information did not state whether the victim was released harmed or unharmed. The Court held that the waiver of indictment was not valid.[4] The Court's reasoning is equally applicable to the proposal here. The Court explained its reasoning as follows:

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[1] The mere designation of a crime as a felony or misdemeanor is not itself determinative. *See Ex Parte Brede,* 279 F. 147 (E.D.N.Y. 1922), *aff'd sub nom. Brede* v. *Powers,* 263 U.S. 4 (1923).

[2] This opinion was withdrawn when the court was later informed that an indictment had been filed. *United States* v. *Ramirez,* 556 F.2d 909, 926 (9th Cir. 1976). In *United States* v. *Indian Boy X,* 565 F.2d 585 (9th Cir. 1977), the court points out that *Ramirez* was withdrawn and rules that juvenile proceedings under Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031–5042 may be initiated by information.

[3] This finding was disputed by the dissenting judges in *Harvin* and by the Ninth Circuit in *Ramirez.*

> Under the statute, that offense is punishable by death if certain proof is introduced at trial. When an accused is charged, as here, with transporting a kidnapping victim across state lines, he is charged and will be tried for an offense which *may* be punished by death. Although the imposition of that penalty will depend on whether sufficient proof of harm is introduced during the trial, that circumstance does not alter the fact that the offense itself is one which *may* be punished by death and thus must be prosecuted by indictment. In other words, when the offense as charged is sufficiently broad to justify a capital verdict, the trial must proceed on that basis, even though the evidence later establishes that such a verdict cannot be sustained because the victim was released unharmed. It is neither procedurally correct nor practical to await the conclusion of the evidence to determine whether the accused is being prosecuted for a capital offense. For the trial judge must make informed decisions prior to trial which will depend on whether the offense may be so punished.

360 U.S. at 8. For similar reasons, the Court likely would conclude here that where an indictment is not waived, the government must proceed by way of the grand jury.

We conclude that the Fifth Amendment would impose a constitutional barrier against the use of informations to prosecute violations under this proposed amendment to the Lacey Act.[5]

LARRY L. SIMMS
Acting Assistant Attorney General
Office of Legal Counsel

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[4] Indictment may not be waived in capital cases. *See* Fed. R. Crim. P. 7(a).

[5] You also ask whether we have any experience with other statutes that might require misdemeanors to proceed by indictment. We do not.

Presidential Succession and Delegation in Case of Disability

[The following memorandum discusses issues relating to presidential succession and delegation of presidential power in the event of a temporary disability of the President. It examines the mechanism established by the Twenty-Fifth Amendment by which the Vice President assumes the powers and duties of the Office of the President, and the conditions under which the President resumes his Office after his disability is ended. It also examines the circumstances in which the President may delegate his powers to other officials, including the Vice President, when it is not considered necessary or appropriate to invoke the provisions of the Twenty-Fifth Amendment. It concludes that functions vested in the President by the Constitution are generally not delegable and must be performed by him; however, any power vested in the President by statute may be delegated to subordinate officers, unless the statute affirmatively prohibits such delegation. Finally, the memorandum briefly reviews the form and method of delegation. An appendix contains a historical summary of prior presidential disabilities and the resulting effect on presidential authority.]

April 3, 1981

MEMORANDUM FOR THE ATTORNEY GENERAL

As a result of the recent assassination attempt on President Reagan, this Office has researched several issues that relate to presidential succession and the delegation of presidential power in the event of a temporary disability of the President. This memorandum sets forth our conclusions on the relevant legal issues.

I. Presidential Succession

The Twenty-Fifth Amendment to the U.S. Constitution establishes a mechanism for presidential succession in the event that the President becomes unable to perform his constitutional duties. Succession may take place in two ways. First, if the President is able and willing to do so, he may provide for the temporary assumption of the powers and duties of his office by the Vice President by "transmit[ting] to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office." U.S. Const., Amend. XXV, § 3. When the President transmits such a declaration, his powers and duties devolve upon the Vice President as Acting President[1] until the Presi-

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[1] There appears to be no requirement that the Vice President resign from his position as Vice President or take the President's oath of office to serve as "Acting President." As a general rule, an

Continued

dent transmits an additional written declaration stating that he has become able to perform his responsibilities.

Second, if the President is unable or unwilling to transmit a declaration of his inability to perform his duties, the Vice President will become Acting President [2] if the Vice President and a majority of the "principal officers of the executive departments" transmit to the President pro tempore of the Senate and the Speaker of the House a written declaration that the President is unable to discharge the powers and duties of this Office. *See* U.S. Const., Amend. XXV, § 4. The term "principal officers of the executive departments" is intended to mean "the Cabinet," although the term "Cabinet" has no precise legal definition.[3]

If, during the period in which the Vice President is Acting President, pursuant to the provisions of Section 4 of the Twenty-Fifth Amendment, the President submits to the President pro tempore of the Senate and the Speaker of the House a written declaration that no inability exists, he will resume the powers of his office *unless*, within four days, the Vice President and a majority of the Cabinet heads transmit an additional written declaration stating that the President is unable to discharge his powers and duties. At that point, Congress must decide the

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official who is "acting" in a certain capacity need not vacate the office previously held or take the oath of office ordinarily taken by the person whose duties he has temporarily assumed. This conclusion is supported by *Presidential Inability and Vacancies in the Office of Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 215, 232 (1965); *Presidential Inability: Hearings Before the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 87 (1965). *See also* J. Feerick, The Twenty-Fifth Amendment, 199 (1976) (Feerick). The rule as to resignation and/or taking the President's oath appears to be different for those officials further down the line of succession. *See* 3 U.S.C. § 19. This memorandum does not address the issues involved in the devolution of powers beyond the position of Vice President.

[2] The Vice President will evidently continue to exercise the duties of Vice President while he serves as Acting President. The Vice President would, however, lose his title as President of the Senate. *See* 111 Cong. Rec. 3270 (1965) (Sen. Saltonstall); Feerick at 199.

[3] *See* S. Rep. No. 66, 89th Cong., 1st Sess. 2 (1966). We believe that the "principal officers of the executive departments," for purposes of the Twenty-Fifth Amendment, include the Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, and Secretary of Education. That conclusion is supported by the legislative history. *See* 111 Cong. Rec. 7938 (1965) (Rep. Waggoner); *id.* at 7941 (Rep. Poff); *id.* at 7944–45 (Rep. Whitener); *id.* at 7953, 7954 (Rep. Gilbert). *See also* Feerick at 202–03; 5 U.S.C. § 101. As a practical matter, and in order to avoid any doubt regarding the sufficiency of any given declaration, it would be desirable to obtain the assent of a sufficient number of officials to satisfy any definition of the term "principal officers of the executive departments."

There is some indication that acting heads of departments may participate in the presidential disability determination. Although the legislative history is conflicting, the House Judiciary Committee's report supports this conclusion, *see* H.R. Rep. No. 203, 89th Cong., 1st Sess. 3 (1965), as do the Senate debates, *see* 111 Cong. Rec. 15,380 (1965) (Sen. Kennedy); *id.* at 15,583 (1965) (Sen. Javits); and a leading commentator on the Amendment reaches the same conclusion. *See* Feerick at 203. *Contra*, 111 Cong. Rec. 3284 (1965) (Rep. Hart). The contrary view proceeds on the assumption that such a decision should be made only by persons whom the President personally selected for his Cabinet. Such persons are presumably intimately familiar with the President and are of relatively equal status with the other decisionmakers.

issue within specified time limits. *See* U.S. Const., Amend. XXV, § 4, para. 2.[4]

II. Presidential Delegation

Under circumstances in which it is not considered necessary or appropriate to invoke the provisions of the Twenty-Fifth Amendment, it may nonetheless be desirable for the President to delegate certain powers to other officials, including the Vice President. Under statute, 3 U.S.C. § 301, and under the Constitution, *see Myers* v. *United States,* 272 U.S. 52, 117 (1926), the President has broad authority to delegate functions vested in him by law. At the same time, the Constitution and certain statutory provisions impose limits on the President's power to confer his authority on subordinate officials. The nature and extent of those limits are considered in this section.

A. Constitutional Limitations on the President's Power to Delegate His Functions

As early as 1855, Attorney General Cushing articulated the general rule that the functions vested in the President by the Constitution are not delegable and must be performed by him. 7 Op. Att'y Gen. 453, 464–65 (1855). The Attorney General opined:

> Thus it may be presumed that he, the man discharging the presidential office, and he alone, grants reprieves and pardons for offenses against the United States, not another man, the Attorney General or anybody else, by delegation of the President.
>
> So he, and he alone, is the supreme commander-in-chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States. That is a power constitutionally inherent in the person of the President. No act of

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[4] Under the Amendment, we believe that there is no requirement that the requisite written declarations of disability be personally signed by the Vice President and a majority of the heads of executive departments. The only requirements are that their assent to the declaration be established in a reliable fashion and that they direct that their names be added to the document. Moreover, the Vice President and the Cabinet heads may send separate declarations if necessary. *See Presidential Inability: Hearings Before the House Comm. on the Judiciary,* 89th Cong., 1st Sess. 79–80 (1965). Finally, we believe that under both §§ 3 and 4 of the Amendment, the transfer of authority to the Vice President takes effect "immediately" when the declaration is transmitted or sent, and is not delayed until receipt of the document by the President pro tempore of the Senate and the Speaker of the House. Although the question is not free from doubt, the language and the history of the Amendment tend to support this conclusion. *See* S. Rep. No. 66, 89th Cong., 1st Sess. 12–13 (1965); H.R. Rep. No. 203, 89th Cong., 1st Sess. 13 (1965). *But see* H.R. Rep. No. 564, 89th Cong., 1st Sess. 3 (statement of Managers on the Part of the House to the effect that "after *receipt* of the President's written declaration of his inability . . . such powers and duties would then be discharged by the Vice President as Acting President"). The better construction would allow the devolution of powers "immediately" (the word used in § 4 of the Twenty-Fifth Amendment) upon transmittal. No meaningful purpose would be served by awaiting the arrival of the document. The alternative construction allows a more rapid transition of presidential power when the national interests require it.

> Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President.
>
> So he appoints and removes ambassadors and other officers of the United States, in the cases and with the qualifications indicated by the Constitution.
>
> So he approves or disapproves of bills which have passed both Houses of Congress: that is a personal act of the President, like the vote of a Senator or a Representative in Congress, not capable of performance by a Head of Department or any other person.

A study prepared by this Office in the 1950s reaches the same conclusions. This study and our research suggest that the following are nondelegable functions of the President:

1. The power to nominate and appoint the officers of the United States to the extent provided in Article II, § 2, clause 2 of the Constitution.
2. The power to approve or return legislation pursuant to Article I, § 7, clauses 2 and 3, and the power to call Congress into special session or to adjourn it according to Article II, § 3.
3. The power to make treaties by and with the advice and consent of the Senate. U.S. Const., Art. II, § 2, cl. 2. It should be noted, however, that the power to negotiate treaties and the power to enter into executive agreements may be delegated. *See* 7 Op. Att'y Gen., *supra,* at 465.
4. The power to grant pardons. U.S. Const. Art. II, § 2, cl. 1.
5. The power to remove purely executive presidential appointees. This power is vested in the President as an incident of his appointment power. *Myers* v. *United States,* 272 U.S. at 119.
6. The power to issue executive orders. Only the President can issue formal executive orders and proclamations. He can, however, delegate the power to issue many orders which cover substantially the same subject matter as executive orders and proclamations as long as they are not so named.
7. The powers of the President as Commander-in-Chief of the Army and Navy. U.S. Const., Art. II, § 2, cl. 1. In view of Article I, § 8, clauses 12 and 13, which state that Congress shall have the power to raise and support

> the Army and to provide and maintain a Navy, many of the President's powers as Commander-in-Chief are statutory in part. To conclude that the President may not delegate his ultimate constitutional responsibilities as Commander-in-Chief is not to suggest that he is the only officer of the government who may make military decisions in time of emergency, when immediate response may be necessary. The President may make formal or informal arrangements with his civilian and military subordinates, in order to ensure that the chain of command will function swiftly and effectively in time of crisis. Of course, every military officer must be subordinate to the President.

B. Statutory Limitations on the President's Power to Delegate His Functions

The foregoing discussion sets forth the general rule that the President may not delegate inherent powers that are conferred on him by the Constitution. On the other hand, he may generally delegate powers that have been conferred on him by Congress. Congress has so provided in 3 U.S.C. § 301, which states:

> The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President: *Provided,* That nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions. Such designation and authorization shall be in writing, shall be published in the Federal Register, shall be subject to such terms, conditions, and limitations as the President may deem advisable, and shall be revocable at any time by the President in whole or in part.

Congress has further provided, in 3 U.S.C. § 302, that:

> The authority conferred by this chapter shall apply to any function vested in the President by law if such law

> does not affirmatively prohibit delegation of the performance of such function as herein provided for, or specifically designate the officer or officers to whom it may be delegated. This chapter shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law, and nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President.

As a result of these statutes, the President is authorized to delegate any power vested in him by statute unless the statute "affirmatively prohibit[s] delegation." In our view, a statute should be construed as an "affirmative" prohibition of delegation only if it prohibits delegation expressly or by unmistakable implication. The purpose of §§ 301 and 302 is to facilitate the functioning of the Executive by specifically authorizing delegation in the great majority of cases. To this end, § 301 states a general rule in favor of delegation. In light of the breadth of this general rule, the exception in § 302 should be narrowly construed. The same inference can be drawn from the fact that Congress took care in § 302 not to derogate from any "existing or inherent right of the President to delegate the performance of functions vested in him by law."

Statutes which do expressly or by unmistakable implication prohibit delegation are subject to the possible constitutional objection that the power to delegate is inherent in the Executive and may not be restricted by Congress. The issue is a difficult one and has never been resolved in court. In our view, the wiser course is to comply with any clear congressional intention to prohibit delegation, in order to avoid testing the limits of this constitutional question, unless circumstances imperatively require delegation.

In the brief time we have had to review the matter, we have discovered only a very few statutes that expressly or by unmistakable implication prohibit delegation. What follows is a description of categories of statutes that fall or may fall within this general class.

1. Statutes Explicitly Prohibiting Delegation

The clearest cases are those in which the statute explicitly prohibits delegation. An example is found in the Export Administration Act of 1979, 50 U.S.C. § 2403(e) (Supp. III 1979), which provides that:

> The President may delegate the power, authority, and discretion conferred upon him by this Act to such departments, agencies, or officials of the Government as he may consider appropriate. except that no authority under this

> Act may be delegated to, or exercised by, any official of any department or agency the head of which is not appointed by the President, by and with the advice and consent of the Senate. The President may not delegate or transfer his power, authority, and discretion to overrule or modify any recommendation or decision made by the Secretary [of Commerce], the Secretary of Defense, or the Secretary of State pursuant to the provisions of this Act.

2. Statutes Conferring Nondelegable Functions

An unmistakable congressional intent to prohibit delegation may also be inferred from statutes that impose on the President a duty or power to exercise a nondelegable function. For example, it is commonly thought that only the President may issue an executive order or proclamation. Statutes that authorize the President to take an action, but require him to act by way of executive order or proclamation, can therefore be read as precluding delegation. An example is found in 22 U.S.C. § 441(a):

> Whenever the President . . . shall find that there exists a state of war between foreign states, and that it is necessary to promote the security or preserve the peace of the United States or to protect the lives of citizens of the United States, the President shall issue a proclamation naming the states involved; and he shall, from time to time by proclamation, name other states as and when they become involved in the war.

3. Statutes Implicitly Prohibiting Delegation

A broad range of statutes confer powers on the President but do not state in terms or in the legislative history whether those powers are delegable. In some instances, the character or importance of the powers in question, or other special circumstances, may constitute a sufficient indication of a legislative intent to prohibit delegation.

In the brief time available, we have been unable to reach any firm conclusions regarding particular statutes in this category. In general, it would appear that statutory powers that have been exercised by the President himself on a consistent and longstanding basis are more likely than others to be held nondelegable. An example might be the President's statutory power to enter into or terminate trade agreements with certain nations under 19 U.S.C. § 1351.

A second special circumstance that can give rise to an inference of nondelegability occurs when Congress gives authority to an agency but subjects that authority to a requirement of presidential approval. In this circumstance, it can be argued that a delegation of the President's approval authority back to the agency would subvert the evident legislative intent to assure review by someone outside the agency, while a delegation to anyone else would conflict with the congressional intent to centralize primary administrative responsibility in the agency. For an example of such a statute, *see* § 12(k) of the Securities Exchange Act of 1934, 15 U.S.C. § 781(k).[5]

III. Delegable Functions

All remaining functions of the President may be delegated to subordinate officers. Many statutes explicitly authorize delegation. *See, e.g.,* 22 U.S.C. § 2381 (delegation of certain foreign affairs powers). In the absence of specific authorization, the general delegation statute, 3 U.S.C. §§ 301, 302, explicitly authorizes delegation except where precluded by statute. It is beyond the scope of this memorandum to describe the full extent of the presidential powers and responsibilities that may be delegated.[6] In general, powers which may be delegated include those of approval, authorization, and assignment; powers to establish and convene certain administrative commissions, to designate responsible officers, and to make certain factual determinations; powers to direct that certain actions be taken, to fix compensation of officers, to prescribe certain rules and regulations, and to make recommendations or reports.

It bears repetition that the President may not delegate his power to delegate his own functions. This is, in our view, a function that is constitutionally vested in the President personally. The President may delegate his powers if he is capable of a conscious decision to do so. If, however, he is incapable of such a decision, delegation cannot occur. If such a situation continues for a substantial period of time, it would appear desirable to initiate procedures for presidential succession under the Twenty-Fifth Amendment.[7]

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[5] We emphasize that the above examples are entirely tentative; it may well be that, upon further examination of the statutes and their legislative histories, this Office would conclude that Congress did not intend to prohibit delegation.

[6] For a description of the President's general authority, see President's Advisory Council on Executive Organization, The Powers and Responsibilities of the President (1970).

[7] It might be possible for the President to delegate his powers contingent upon the occurrence of a specified event such as a certification by the President's personal physician that the President is temporarily incapable of making a conscious decision. We would emphasize, however, that this procedure should not be used if its effect is contrary to the intent of the procedures for presidential succession contained in the Twenty-Fifth Amendment.

IV. Form and Method of Delegation

Whenever a presidential function or power is delegable, it may be delegated to the head of any department or agency in the Executive Branch, or any official thereof, if the official is appointed with the advice and consent of the Senate. 3 U.S.C. § 301. By statute, such a delegation is ordinarily accomplished through the preparation and publication of a written order or memorandum. The relevant document is normally signed by the President personally; but there is no express statutory requirement to that effect. In our opinion, the relevant statutory requirements are satisfied as long as the President actually makes the delegation in question and causes an appropriate written memorial to be prepared and published. He need not sign the document by his own hand. *See United States* v. *Fletcher*, 148 U.S. 84–92 (1893); 7 Op. Att'y Gen. at 472–73 (1855); 22 Op. Att'y Gen. 82, 84 (1898). Moreover, the statute does not purport to restrict the President's constitutional power to delegate his powers and functions. 3 U.S.C. § 302. We believe that a President may determine in an exigent circumstance that it is necessary to delegate a power or function without immediate compliance with the normal formal requisites (i.e., publication of a written document). Such a delegation is effective if it is necessary to enable the President to discharge his constitutional duty.

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Assistant Attorney General
Office of Legal Counsel

Attachment

APPENDIX

Prior Presidential Disabilities

This is a summary of prior presidential disabilities and the resulting effect on presidential authority.[1]

1. James Madison suffered from a severe fever in the summer of 1813 in the midst of disputes with Congress on how to pay for the War of 1812. I. Brant, James Madison: Commander-in-Chief, 1812–1836, at 184–94 (1961). Daniel Webster reported at one point that Madison was too weak to read resolutions brought to his bedside. *Id.* at 186–87. Both Houses of Congress became "engrossed" for over a month in speculation on the succession,[2] since the Vice President was aged and there was a vacancy in the position of President pro tempore of the Senate. J. Feerick, The Twenty-Fifth Amendment 4–5 (1976) (Feerick). Madison recovered, however, and no legislation was passed nor were formal arrangements for the delegation or transfer of power implemented.

2. William Henry Harrison was inaugurated on March 4, 1841, and died of pneumonia on April 4, 1841. His illness was so short that the question of inability apparently did not arise.[3]

3. James A. Garfield was wounded on July 2, 1881, by an assassin and died 80 days later on September 19, 1881. Vice President Chester A. Arthur did not act in his stead. Arthur refused to do so because of a fear, shared by many constitutional scholars of the time, that once he had assumed the powers and duties of the office, they would "devolve on the Vice President" permanently, leaving him unable to turn the reins back to the President. U.S. Const., Art. II, § 1, cl. 6. *See* S. Rep.

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[1] Material consulted included the N.Y. Times, S. Rep. No. 66, 89th Cong., 1st Sess. (1965), and hearings held in 1958. *Presidential Inability: Hearings on S.J. Res. 100, S.J. Res. 133, S.J. Res. 134, S.J. Res. 141, S.J. Res. 143, S.J. Res. 144, S. 238, and S. 3113 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 85th Cong., 2d Sess.* (1958) [hereinafter cited as *1958 Hearings*]. A list of articles on presidential inability can be found in the *1958 Hearings*, at 41–42.

[2] The first succession act was passed in 1792. Act of March 1, 1792, §§ 9–11, 1 Stat. 239. Unsuccessful efforts to change this statute occurred in 1820, 1856, and 1881.

[3] When Harrison died, Secretary of State Daniel Webster questioned whether the Constitution meant that Vice President John Tyler became "Acting President," rather than the President. Tyler disagreed and took the oath as President, thus establishing the "Tyler precedent" that the Vice President does succeed to the Office of the President when the prior occupant dies. *1958 Hearings* at 149.

The deaths of Zachary Taylor (July 9, 1850) and Abraham Lincoln (April 15, 1865) were apparently so swift that their Vice Presidents (Millard Fillmore, Andrew Johnson) assumed control without trouble. Feerick at 7–8.

No. 66, 89th Cong. 1st Sess. 6 (1965) (1965 Senate Report). Although the entire Cabinet believed Garfield to be unable to carry out his duties,[4] four of them, including the Attorney General, agreed with Arthur's analysis. Secretary of State James G. Blaine was in fact criticized for attempting to usurp presidential powers during Garfield's lengthy illness. *1958 Hearings* at 149–50.[5]

4. Grover Cleveland had two major operations for cancer of the mouth in July 1893. He told almost no one, including Vice President Adlai Stevenson. The two operations took place on a friend's yacht, with Cleveland unconscious and strapped to a chair propped against the mast. Feerick at 11–12. The complete secrecy was due to fears that the country might suffer an economic panic if it knew the President had cancer. The truth was apparently suppressed until 1917. Feerick at 12.[6]

5. William McKinley was wounded on Friday, September 6, 1901. He underwent emergency surgery and his doctors issued optimistic statements about his recovery. So positive was the outlook that Vice President Theodore Roosevelt and the Cabinet members who had gathered in Buffalo over the weekend began to disperse. M. Leech, In the Days of McKinley 598–99 (1959). "[T]he Vice-President was so firmly convinced that the emergency was over that he went to join his family at a camp in the Adirondacks, twelve miles from telegraph or telephone." *Id.* at 599. When McKinley began to fail, a guide was sent up into the mountains to fetch Roosevelt. Although he rushed back, Roosevelt arrived to take the oath of Office 12 hours after McKinley's death on September 14.

6. Woodrow Wilson was incapacitated from a stroke for about eight months of his second term. At no time did Vice President Thomas R. Marshall attempt to take over. *See 1958 Hearings* at 19. The hesitation was due to a fear that such action would be viewed as an effort to oust Wilson permanently. When he recovered, Wilson forced Secretary of State Lansing, who had called Cabinet meetings and suggested that Marshall take over as Acting President, to resign, charging him with disloyalty. *Id.*

7. Franklin Roosevelt was in declining health during his last year in office, and died on April 12, 1945. Vice President Harry S. Truman had had only two conversations with Roosevelt since the inauguration, neither dealing with disability. Feerick at 17. Perhaps as a reaction to this, Truman supported a new succession statute, Act of June 25, 1948, Pub. L. No. 80–771, 62 Stat. 672, 677–78 (1948).

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[4] Garfield was able to conduct only one minor piece of business—the signing of an extradition paper. Feerick at 9.

[5] Arthur, who succeeded Garfield, suffered from an increasingly debilitating kidney disease while in office. Although he gradually reduced his schedule, he does not appear to have become completely incapacitated. Feerick at 10–11.

[6] It was the death of Cleveland's first Vice President, Thomas A. Hendricks, in 1885, while Congress was out of session, which accelerated passage of the Presidential Succession Act, Pub. L. No. 49-1, 24 Stat. 1 (1886).

8. Dwight D. Eisenhower suffered three major illnesses while in office—a heart attack (1955), ileitis (1956), and a "mild" stroke (1957). From the first, Vice President Richard Nixon consulted with the Cabinet and developed a procedure for relaying important matters to the President. A White House request for an opinion on the temporary delegation of presidential power was not acted upon because Attorney General Brownell felt there were sufficient legal arrangements in place to handle day-to-day operations.

Eisenhower was very troubled by the implications of the disability problem during each of his illnesses. He asked the Department of Justice to study the problem and recommend a solution, urged Congress to act, and entered into an informal agreement with Mr. Nixon. Feerick at 20–22. The agreement provided that:

> 1. In the event of inability the President would—if possible—so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.
>
> 2. In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the office and would serve as Acting President until the inability had ended.
>
> 3. The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.

1965 Senate Report at 7.[7] Although Congress did hold hearings, no permanent action was taken.[8]

9. Lyndon B. Johnson was hospitalized four times, the first time being for a major bout with the flu (January 23–27, 1965).[9] In October 1965, Johnson was hospitalized for gall bladder surgery.[10] He was

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[7] *See also* N.Y. Times, March 4, 1958, at 1, col. 2. Presidents Kennedy and Johnson entered into similar agreements with their Vice Presidents. 1965 Senate Report at 7. N.Y. Times, Jan. 28, 1965, at 13, col. 1. The Johnson-Humphrey agreement was identical to the Eisenhower-Nixon agreement. The Kennedy agreement differed only in that it urged the Vice President to consult with the Cabinet and the Attorney General "as a matter of wisdom and sound judgment." 1965 Senate Report at 7.

[8] *See 1958 Hearings, supra,* and *Hearings before the Special Subcommittee to Study Presidential Disability of the House Committee on the Judiciary,* 84th Cong., 2d Sess. (1956).

[9] At the time, Vice President Hubert H. Humphrey stated that there had been discussions of when he would take over and a copy of the Johnson-Humphrey accord was made available to the press on January 28. *See* note 7, *supra,* and text.

[10] The accord was again noted by the press and columnist Arthur Krock urged the states to ratify the Twenty-Fifth Amendment.

anesthetized for three to four hours, after which Press Secretary Moyers announced that Johnson was again able to make presidential decisions.[11]

The same pattern was repeated in November 1967, when Johnson underwent simultaneous surgery for a polyp on his vocal cord and repair of a ventral hernia. He was anesthetized for about an hour and a half. Note was made of the agreement that could make Humphrey "Acting President" and columnist Tom Wicker urged that the Twenty-Fifth Amendment be ratified.

In December 1968, Johnson was again hospitalized for the flu. The papers, however, said little other than that he worked on government papers on one day of his stay.

10. Richard M. Nixon was hospitalized from July 12–20, 1973, for viral pneumonia. The President's press office said that he would be able to do necessary work and that he was not sick enough to require the Vice President to make special arrangements. In an interview, Vice President Spiro T. Agnew said that there was no agreement between the President and him on what to do in the event of Nixon's disability and that the issue had never been discussed.

Although there were persistent rumors about Nixon's health during the months prior to his resignation, the only White House announcement was an acknowledgment that the President suffered from phlebitis. The operation on his leg did not occur until September 23, 1974, after his resignation.

11. Jimmy Carter's scheduled surgery for hemorrhoids in late December 1978, was cancelled. Preparations for the Vice President to assume power under § 3 of the Twenty-Fifth Amendment were also cancelled.

Larry L. Simms
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Office of Legal Counsel

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[11] Citing recent history, Johnson had urged Congress to act on the disability problem in his State of the Union address in January, 1965. The proposed Twenty-Fifth Amendment was sent to the states in July 1965.

Amendment of the Farmers Home Administration Disaster Loan Program

Under applicable provisions of the Administrative Procedure Act, amendments to regulations governing the disaster loan program administered by the Farmers Home Administration (FmHA) can be made effective immediately, without giving the public a prior opportunity to comment, if the FmHA finds for "good cause" that notice and public procedure thereon would be "impracticable, unnecessary, or contrary to the public interest."

It is for the rulemaking agency to determine whether there is "good cause" for dispensing with notice and comment; however, if the facts are such that the authorized administrative purpose would be frustrated by delay, the argument for proceeding expeditiously is reasonable on its face.

April 24, 1981

MEMORANDUM OPINION FOR THE COUNSEL TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

You have requested the views of this Office on a procedural question that involves regulations that govern the disaster loan program administered by the Farmers Home Administration (FmHA). The question is whether the FmHA can amend these regulations and make the amendment effective immediately, without giving the public an opportunity to comment on the amendment beforehand.

The relevant facts, as we understand them, are as follows: The disaster loan program is governed by Title III of the Consolidated Farm and Rural Development Act, *as amended* (the Act), 7 U.S.C. §§ 1961–1996. The Act authorizes the Secretary of Agriculture to make and insure loans for persons whose agricultural operations have been "substantially affected" by natural disaster. 7 U.S.C. § 1961(b). It also gives the Secretary broad authority to make regulations that prescribe the terms and conditions under which those loans will be made and insured. *See* 7 U.S.C. § 1989. Relying upon that general authority, the FmHA has promulgated elaborate regulations that establish eligibility standards, loan criteria, and loan application procedures. *See* 45 Fed. Reg. 9848 (1980). The FmHA is now considering various amendments to these regulations, and the question has arisen whether these amendments can be made effective for loan applications arising from disasters that occurred in the 1980 crop year. With the advent of the new planting season, the 1980 applications are being filed and granted at a rapid rate, and the process will be complete in a few weeks. The amendments now under consideration cannot substantially affect that process unless they are made effective immediately.

The Act itself does not require the agency to follow any particular procedure in making or amending the regulations that govern the loan program. The relevant provisions of this Administrative Procedure Act (APA), which establish a generic "notice and comment" procedure for informal agency rulemaking, do not apply of their own force to matters relating to agency "loans." 5 U.S.C. § 553(a)(2). The Secretary of Agriculture, however, has adopted the APA procedure and has made it applicable to all USDA loans. In a memorandum published in July, 1971, the Secretary announced the following policy:

> The public participation requirements prescribed by 5 U.S.C. § 553(b) and (c) will be followed by all agencies of the Department in rule making relating to . . . loans . . . . The exemptions permitted from such requirements where an agency finds for good cause that compliance would be impracticable, unnecessary, or contrary to the public interest will be used sparingly, that is, only when there is a substantial basis therefor. Where such a finding is made, the finding and a statement of the reasons therefore [sic] will be published with the rule.

36 Fed. Reg. 13,804 (1971).[1]

To our knowledge, this memorandum has never been modified or withdrawn. It has been treated by the courts as an agency rule, binding on the FmHA while in force. *See Berends* v. *Butz,* 357 F. Supp. 143 (D. Minn. 1973).

The 1971 memorandum makes reference to the statutory exemption that permits new agency rules to be effective without prior comment by the public. Under the APA, this exemption may be invoked if the agency finds, for "good cause," that notice of a proposed rule and public procedure thereon would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §§ 553(b)(B), 553(d)(1). In accordance with the terms of the 1971 memorandum, the FmHA may invoke the statutory exemption if it makes the required "good cause" finding and the finding is supported by a "substantial basis."

It is for the agency to determine whether the circumstances of the present case are such that the exemption to the notice and comment procedure should be invoked. The judgment whether notice and comment is "impracticable, unnecessary, or contrary to the public interest" is judicially reviewable, *see, e.g., Nader* v. *Sawhill,* 514 F.2d 1064 (Temp. Emer. Ct. App. 1975); but at bottom it is a policy judgment, grounded in facts and in the agency's view of what the interests of the public require. We note simply that if the amendments under consideration here are authorized by the Act, and if the facts are such that the authorized administrative purpose would be frustrated if the effective date of the amendments were delayed, the argument for proceeding expeditiously, on grounds of practicality and public interest, is reasonable on its face.[2]

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[1] We note that the 1971 memorandum adopts the "public participation" requirements of § 553(b) and § 553(c) but does not by its terms adopt the 30-day publication requirement of § 553(d).

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[2] We would also observe that the Secretary of Agriculture is free at any time to revoke or render inapplicable to any particular rulemaking the policy established in 1971. Such revocation, *in toto* or as applied to a specific rulemaking, would, we believe, be dispositive of the question raised by the existence of that policy. Such revocation should be done in a public document at any point prior to issuance of a final rule. *See Nader* v. *Bork*, 366 F. Supp. 104 (D.D.C. 1973).

Contacts Between the Office of Management and Budget and Executive Agencies Under Executive Order No. 12,291

Agencies are not precluded from receiving, in the context of informal rulemaking, views or information outside the usual channels for public comment, notwithstanding the *ex parte* contacts doctrine developed in the D.C. Circuit, and the Office of Management and Budget (OMB) is under no duty to refrain from communicating with rulemaking agencies pursuant to its implementation of Executive Order No. 12,291.

The Administrative Procedure Act's provisions for judicial review and public participation in informal rulemaking may be construed to imply an agency obligation to disclose communications from outside the agency, including communications which occur after the publication of proposed rulemaking. Therefore, in order to reduce the danger of reversal, such communication should be included in the administrative file and the record for judicial review, at least to the extent that they are factual as opposed to deliberative in nature.

A rulemaking agency need not disclose substantive communications from OMB or other federal agencies which form part of its deliberative process; however, the deliberative process does not extend to the legal or policy views of persons outside of executive or independent agencies, even when they are transmitted by an agency acting as a conduit for the third party.

April 24, 1981

MEMORANDUM OPINION FOR THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Your Office has requested the views of this Office regarding the legality of contacts which may occur between you and your staff and officials of executive agencies in the implementation of Executive Order No. 12,291, 3 C.F.R. 127 (1982) (Order). The Order generally requires these agencies to maximize the benefits and minimize the costs of regulations promulgated following informal rulemaking proceedings. Your Office is charged with ensuring compliance with these requirements by engaging in prepublication review of proposed and final rules and preliminary and final Regulatory Impact Analyses (RIA). In performing this oversight role, you and your staff will presumably communicate on a regular basis with agency officials regarding the substance of proposed regulations. You might also wish to transmit to these agencies information or arguments received from other federal agencies or from non-federal parties. Some or all of these contacts might be challenged under the so-called "*ex parte* contacts" doctrine developed in the D.C. Circuit.[1]

We conclude that neither the *ex parte* contacts doctrine nor other generally applicable provisions of law impose any duties on you or your staff to refrain from communicating with rulemaking agencies. The law is uncertain as to whether rulemaking agencies must disclose communications from your Office which occur after publication of a notice of proposed rulemaking. In order to reduce the danger of reversal, we believe that rulemaking agencies should include in the administrative file and the record for judicial review: (1) oral or written information from your Office of a purely factual nature; and (2) oral or written material received from an interested party outside the federal government which influences the views your Office expresses to the agency. Your Office could assist rulemaking agencies in complying with these recommendations by following procedures similar to those described herein.

I. *Ex Parte* Contacts Doctrine

The D.C. Circuit has thrice addressed the question of *ex parte* contacts in informal rulemaking. In *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9 (D.C. Cir) (*per curiam*), *cert. denied*, 434 U.S. 829 (1977), interested private parties engaged in wide-spread, off-the-record communications with FCC Commissioners and staff regarding a proposed cable television rule. The court condemned the comments on several grounds, including the Due Process Clause, the judicial review requirements of the Administrative Procedure Act (APA), and what the court perceived to be a general need to ensure rationality and fairness in agency decision processes. In a broadly worded dictum, the court stated that such communications would be improper even if the FCC disclosed them in the administrative file in time to allow public comment and judicial review. The court also said that such comments would be permissible prior to publication of a notice of proposed rulemaking. 567 F.2d at 59.

In *Action for Children's Television* v. *FCC*, 564 F.2d 458 (D.C. Cir. 1977), a different panel of the D.C. Circuit refused to apply *Home Box Office* retroactively. In dictum, the panel severely criticized the *Home Box Office* rationale and expressed its view that the doctrine should be limited to a narrow class of cases involving competing private claims to a valuable privilege. *Id.* at 477.

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[1] *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir. 1959); *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9 (*per curiam*) (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Action for Children's Television* v. *FCC*, 564 F.2d 458 (D.C. Cir. 1977); *United States Lines, Inc.* v. *FMC*, 584 F.2d 519 (D.C. Cir. 1978); *Hercules, Inc.* v. *EPA*, 598 F.2d 91 (D.C. Cir. 1978); *National Small Shipments Traffic Conference, Inc.* v. *ICC*, 590 F.2d 345 (D.C. Cir. 1978); *United Steelworkers of America* v. *Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied sub nom. Lead Industries Ass'n* v. *Donovan*, 453 U.S. 913 (1981).

While other circuits have not taken a clear position on *ex parte* contacts, the D.C. Circuit cases are particularly significant because so many federal regulatory actions are reviewed there and because, as a practical matter, the D.C. Circuit is often the court of last resort in light of the Supreme Court's limited docket.

In *United Steelworkers of America* v. *Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied sub nom. Lead Industries Ass'n* v. *Donovan*, 453 U.S. 913 (1981), the D.C. Circuit limited the *ex parte* contacts doctrine in the context of intra-agency communications. While formulating a final rule regulating workplace exposure to airborne lead, the Assistant Secretary of Labor consulted closely with a staff attorney who argued for the agency staff's proposed standard. The Assistant Secretary also commissioned private consultants to review and analyze the record, and partly relied on these studies in formulating a final rule. The Court, *per* Chief Judge Wright, held that these off-the-record intra-agency communications were permissible, even if slanted towards a particular viewpoint,[2] if they were part of the "deliberative process," a concept closely analogous to the deliberative process exemption under the Freedom of Information Act (FOIA).[3]

The doctrine developed in *Home Box Office* involves three distinct requirements: (1) a flat prohibition on agency receipt of views and information outside the usual channels for public comment; (2) a requirement that such views and information, if received, be memorialized and placed in the administrative file for public comment; and (3) a duty to place such views and information in the record for judicial review. In *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), the Supreme Court severely undermined the *Home Box Office* doctrine. It held that, absent exceptional circumstances, a reviewing court may not impose special rulemaking procedures beyond those set forth in the APA.

We believe that *Vermont Yankee* is inconsistent with D.C. Circuit's flat ban on agency receipt of views or information outside the usual channels for public comment. This purely procedural prohibition finds no support whatever in the text or the legislative history of the APA. The APA contains no prohibition on such contacts in informal rulemaking, although it has always prohibited them in adjudication,[4] and a recent amendment provides penalties and remedies when they occur in adjudication or formal rulemaking.[5] Early versions of that amendment prohibited such contacts in informal rulemaking as well,[6] but the provision was deleted with the intention of leaving informal rulemaking unaffected.[7] We believe this history to be strong evidence that there is no basis for imposition by a court of a flat prohibition on agency receipt of views or information outside the ordinary channels. You and your staff may freely contact agencies regarding the substance of proposed regulations, and may do so by way of telephone calls, meetings, or other forms of communication unavailable to members of the public.

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[2] *Compare Association of National Advertisers, Inc.* v. *FTC*, 627 F.2d 1151 (D.C. Cir. 1979) (disqualification for bias).

[3] 5 U.S.C. § 552(b)(5) (1976).

[4] 5 U.S.C. § 554(d) (1976).

[5] Government in the Sunshine Act, 5 U.S.C. § 557(d) (1976).

[6] *See* S. 260, 93d Cong., 1st Sess. 119 Cong. Rec. 647–51 (1973); H.R. 10000, 93d Cong., 1st Sess. 119 Cong. Rec. 28,205 (1973); *Hearings on Government in the Sunshine Before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Government Operations*, 93d Cong., 2d Sess. 189–254 (1974); Senate Comm. on Government Operations, 93d Cong., 2d Sess., *Government in the Sunshine: Response to Subcomm. Questionnaire* (Comm. Print. 1974).

It is unclear whether the two other requirements of *Home Box Office*—that the substance of contacts be placed in the administrative file and the record for judicial review—can survive *Vermont Yankee.* These requirements might possibly be supportable, not as part of an "*ex parte* contacts" doctrine, but as implications of the APA's provisions for judicial review and for public participation in informal rulemaking, a question we discuss in the following section. What is clear, however, is that the disclosure obligations, if any, lie with the rulemaking agency and not with your Office. Your Office is therefore under no legal disability with respect to contacts with rulemaking agencies. At most, your Office could adopt procedures as a matter of policy to assist the agencies in complying with our recommendations or with rules fashioned by the agencies themselves to address this issue.[8]

II. Disclosure Obligations of Rulemaking Agencies

We believe that, at least as a matter of protection against reversal in the D.C. Circuit, rulemaking agencies should disclose in the administrative file and the record for judicial review substantive communications from your Office to the extent that they are (1) purely factual as opposed to deliberative in nature, or (2) received by your Office from a source outside of executive or independent agencies. This conclusion is based on a combination of possible disclosure requirements in the APA and a deliberative process exception.

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[7] S. Rep. No. 354, 94th Cong., 1st Sess. 35 (1975); 121 Cong. Rec. 35,330 (1975) (remarks of Sen. Kennedy).

[8] Specific "hybrid rulemaking" statutes may sometimes impose special rules regarding contacts between your Office and rulemaking agencies. The Clean Air Act Amendments of 1977, for example, require that written documents compiled during your Office's review procedures be placed in the rulemaking docket prior to the promulgation of a final rule. 42 U.S.C. § 7607(d)(4)(B)(i) (Supp. III 1979). These documents are excluded from the record on judicial review. *Id.* § 7607(d)(4)(B)(ii). Two challenges to interagency participation in Clean Air Act rulemaking are now pending in the D.C. Circuit. *Sierra Club* v. *Costle*, Nos. 79–1565 *et al.*; *American Petroleum Institute* v. *Costle*, Nos. 79–1104 *et al.* In those cases EPA officials met with other Executive Branch officials to discuss a rule after the close of the public comment period; the substance of these meetings was not fully disclosed in the record for judicial review. The government takes the position that EPA fully complied with the Clean Air Act's requirements. The cases have been argued and await decision.*

Internal agency regulations, which have the force of law until repealed, may also limit contacts with your Office during rulemaking. *Cf.* 47 C.F.R. § 1 (1979) (FCC); 16 C.F.R. § 1012 (1979) (CPSC); 14 C.F.R. § 300.2 (CAB).

*Note: In *Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981), the court of appeals held that "the existence of intra-Executive Branch meetings during the post-comment period . . . violated neither the procedures mandated by the Clean Air Act nor due process." 657 F.2d at 408. In *American Petroleum Institute* v. *Costle*, 665 F.2d 1176 (D.C. Cir. 1981) *cert. denied* 455 U.S. 1034 (1982), the court of appeals refused to consider the plaintiff's objection to EPA's post-comment period contacts with OMB, on grounds that this objection had not first been raised in the administrative proceedings. Ed.

A. APA Provisions

The APA provides that judicial review of informal rulemaking shall be based on the "whole record." 5 U.S.C. § 706. The Supreme Court has never clearly stated what types of material must be included in the record for judicial review. Traditionally, informal rulemaking procedures were thought to leave the agency almost complete discretion as to what was included in the record; judicial review was correspondingly narrow and deferential. More recently, the Supreme Court has stated that judicial review of informal agency action should be "searching and careful," [9] and that a reviewing court should remand a case to the agency if its determination is not "sustainable on the administrative record made." [10] The relatively intensive judicial scrutiny implied by these statements seems incompatible with the traditional idea that the agency retains complete control over what goes in the record. Lower federal courts have expanded on the Supreme Court's tentative statements by inferring a requirement that the record for judicial review contain all material, whether factual, analytical, or argumentative, which is substantive in the sense that it might have influenced the agency's decision.[11] Finally, the Supreme Court in *Vermont Yankee* gave somewhat conflicting signals on the question.[12] The Court's emphasis on the agency's discretion to structure its own procedures free of judicial interference suggests that this discretion should include the power to determine the content of the record for judicial review. On the other hand, the Court's remand of the case to the D.C. Circuit for a determination of whether the rule was sustainable on the administrative record points to a more stringent record requirement.[13]

The state of the law on this point is, in short, confused. We do not believe it to be particularly useful to attempt to predict whether the Supreme Court would require that substantive oral or written communications received by the agency be included in the record for judicial review. We would, however, recommend that agencies generally adopt this course to avoid a substantial danger of reversal in the D.C. Circuit without any assurance of vindication in the Supreme Court.[14]

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[9] *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

[10] *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973) (*per curiam*).

[11] *See National Courier Ass'n* v. *Board of Governors*, 516 F.2d 1229, 1241 (D.C. Cir. 1975). *See generally Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *Kennecott Copper Corp.* v. *EPA*, 462 F.2d 846 (D.C. Cir. 1972); *International Harvester Co.* v. *Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973). Cf. Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[12] *Compare* Stewart, *Vermont Yankee and The Evolution of Administrative Procedure*, 91 Harv. L. Rev. 1805 (1978), *with* Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 Harv. L. Rev. 1823 (1978).

[13] One commenter has argued that in light of the administrative record the Court should simply have affirmed the agency rather than remanding. Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 Harv. L. Rev. 1833 (1978).

We would also recommend that agencies generally include substantive oral or written communications in the administrative file for public comment and criticism, at least when these communications occur before the close of public comment.[15] A "public comment" requirement could be inferred from the APA's provision for review on the whole record and its guarantee of an "opportunity to participate in the rule making," 5 U.S.C. § 553(c). On the other hand, such a requirement comes perilously close to the type of extra-statutory procedure *Vermont Yankee* forbids courts to require of agencies. In addition, the opportunity to comment on evidence in the record seems inconsistent with the realities of informal rulemaking, clearly sanctioned by the APA, that interested parties can file comments on the last day of the comment period and thereby deprive others outside the government of a chance to comment unless the agency, in its discretion, chooses to reopen the file. The argument for public comment is considerably weaker than the case for placing substantive material in the judicial record; our judgment is that the Supreme Court would not impose such a requirement. Nevertheless, the D.C. Circuit probably would require public comment,[16] and the prospects of obtaining Supreme Court review of such a determination cannot be predicted.

B. Deliberative Process Exception

Notwithstanding these general recommendations, we believe that the rulemaking agency need not disclose substantive communications from your Office which form part of the agency's deliberative process. A variety of legal doctrines recognize a privilege against compelled disclosure of the federal government's deliberations. The need for nondisclosure is inherent in the President's constitutional power to "take Care that the Laws be faithfully executed," [17] by "supervis[ing] the guid[ing]" executive agencies in their "construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Art. II of the Constitution evidently contemplated in vesting general executive power in the President alone." [18] Similar concerns undergird the constitutionally based privilege for certain deliberative communications within the Executive Branch,[19] as well as the rule against probing an administrator's mind in court absent a showing of bad faith or other exceptional circumstances.[20] Congress has safeguarded the deliberative process by exempting deliberative documents from disclosure under the FOIA.[21] Finally, the D.C. Circuit held the *ex parte* contacts doctrine inapplicable to deliberative process communications in *United Steelworkers, supra.* For similar reasons, we believe that oral or written communications which are part of the deliberative process need not be disclosed under any provisions of the APA.

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[14] The agency need not engage in unnecessary duplication of material already contained in the record, however.

[15] A case-by-case analysis may be required to determine whether the administrative file must be reopened to allow public comment on communications received after the close of the comment period. *See Ethyl Corp.* v. *EPA*, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

[16] *See Home Box Office, Inc.* v. *FCC*, *supra* 567 F.2d 9; *Ethyl Corp.* v. *EPA*, *supra*, 541 F.2d 1. *Cf. United States Lines, Inc.* v. *FMC*, 584 F.2d 519 (D.C. Cir. 1978) (informal adjudication).

[17] U.S. Const., Art. II, § 3. *See also* U.S. Const., Art. II, § 2 (presidential power to require written opinions from heads of executive departments).

[18] *Myers* v. *United States*, 272 U.S. 52, 135 (1926).

Deliberative process communications are those designed to aid the agency in determining its course based on the facts of record. They include analyses of these facts,[22] legal and policy arguments,[23] and factual data that cannot be reasonably segregated from deliberative material.[24] They do not include oral or written factual data which can be reasonably segregated from deliberative material.[25] Thus the rulemaking agency need not disclose your Office's legal and policy arguments and analyses of the facts, but should generally disclose readily segregable factual material.

Communications from executive or independent agencies are entitled to deliberative process protection. Your Office surely participates in the deliberative process when it exercises the power of the President delegated to you to "supervise and guide" the agency by communicating factual analyses or legal and policy arguments. We believe the deliberative process is also implicated when your Office acts as a "conduit" for views of other executive agencies, since these agencies are part of an integrated Executive Branch headed by the President. We reach the same conclusion with respect to independent agencies.[26] Although largely freed of presidential oversight and supervision, these agencies are part of a unitary government which seeks as far as possible to coordinate its programs and policies.[27]

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[19] *See United States* v. *Nixon,* 418 U.S. 683 (1974).

[20] *See, e.g., United States* v. *Morgan,* 313 U.S. 409, 422 (1941); *National Courier Ass'n* v. *Board of Governors,* 516 F.2d at 1241–42.

[21] 5 U.S.C. § 552(b)(5); *see generally NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132 (1975).

[22] *See United Steelworkers of America* v. *Marshall, supra,* 647 F.2d at 1212 n.20, 1218.

[23] *See, e.g., NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. at 149 (exemption 5 protects attorney-client and attorney work-product privileges); *EPA* v. *Mink,* 410 U.S. 73, 91 (1973) (exemption 5 protects "matters of law, policy or opinion").

[24] *See EPA* v. *Mink,* 410 U.S. 73, 88 (1973); *United Steelworkers of America* v. *Marshall, supra,* 647 F.2d at 1220; *Mead Data Central, Inc.* v. *United States Department of Air Force,* 566 F.2d 242, 260–61 (D.C. Cir. 1977).

[25] *See* cases cited in note 24, *supra.* Also not within the deliberative process are communications which the agency adopts as the explanation for its action. *See Renegotiation Board* v. *Grumman Aircraft Engineering Corp.,* 421 U.S. 168 (1975); *NLRB* v. *Sears, Roebuck & Co., supra,* 421 U.S. 132.

[26] Deliberative process documents transmitted from an independent agency to an Executive Branch agency would be exempt from disclosure under FOIA. 5 U.S.C. §§ 552(b)(5), 552(e).

[27] Our conclusions in this regard are consistent with Recommendation 80-6 of the Administrative Conference of the United States Regarding Executive Branch Communications in Informal Rulemaking Proceedings. Administrative Conference of the United States: Recommendations and Reports 27 (1980).

Our view is that the deliberative process does not extend to the legal or policy views of persons outside of executive or independent agencies. These persons are not within the overall decision process of the rulemaking agency. Their views not being protected by a deliberative process exception, the rulemaking agency would be well advised to place these views in the administrative file and the record for judicial review if the views might affect the agency's decision. Agencies should follow this procedure even if the views are transmitted by an executive or independent agency acting as a "conduit" for the third party.

III. OMB Procedures

As discussed above, your Office is under no legal obligation to limit its communications with rulemaking agencies. We also conclude that, as a matter of policy, the agencies should include in the administrative file and the record for judicial review substantive oral or written communications from your Office which (1) are purely factual in nature, or (2) are "conduit" transmissions of views or information from persons outside of executive or independent agencies. Your Office could assist the rulemaking agencies in the task of distinguishing what should be disclosed from what may be kept out of the public record, as follows:

> (1) Your Office could separate, as far as possible, purely factual material from arguments and analyses in oral or written comments it makes to the rulemaking agency under the Order. A format could be developed for comments which clearly draws this distinction. The agency should generally be entitled to rely on your Office's judgment that the transmitted material is deliberative rather than factual in nature.
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> (2) With respect to "conduit" communications, the official responsible for commenting to the rulemaking agency could determine whether his views have been influenced by oral or written communications received from someone outside of executive or independent agencies. If so, your Office could require that the third party transmit this material to the rulemaking agency for inclusion in the administrative file and the record for judicial review. The official may transmit to the rulemaking agency a statement of your Office's views, which need not be disclosed except to the extent it includes purely factual material.

Alternatively, or in conjunction with these procedures, your Office could seek to ensure that rulemaking agencies follow the advice contained in this memorandum. Agencies could institute a policy of disclosing in the administrative file and the record for judicial review all material which your Office identifies as purely factual in nature, as well as the identified conduit material transmitted under (2) above. The agencies would have to develop procedures for memorializing the non-deliberative parts of oral communications from your Office. Your Office could assist the agencies in following these recommendations by rendering informal advice or by more formal instructions.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Constitutionality of Statute Imposing Death Penalty for Attempted Assassination of the President

Under applicable Supreme Court precedent, a statute making it a capital offense to attempt to assassinate the President would be unlikely to survive constitutional challenge, unless it were narrowly drawn to include only cases in which the defendant's intent was unambiguous and the attempt nearly successful.

Both historical precedent and contemporary practice in this and other countries suggest that death would ordinarily be regarded by a court as an excessive punishment for the crime of attempted murder. On the other hand, the unique position of the President in our constitutional system, coupled with the threat to the national security which an assault on his person would constitute, may warrant subjecting the crime of attempted assassination of the President to the death penalty.

April 30, 1981

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

This responds to your request for the views of this Office with respect to the constitutionality of a proposed statute imposing the death penalty for the offense of attempted assassination of the President.[1] For the reasons that follow, we believe that such a statute, if drafted narrowly and with extreme care, might well be upheld by the Supreme Court. We must caution, however, that the question is an extremely close and difficult one on which the Supreme Court has given little guidance, and that the outcome of a challenge to the law may well depend on the particular factual context to which it is applied.

I. Background

Prior to considering the issues raised, it may be helpful briefly to review recent Supreme Court decisions on capital punishment. In *Furman* v. *Georgia*, 408 U.S. 238 (1972), a five-Justice majority ruled in a per curiam opinion that the imposition of the death penalty in the cases before the Court would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[2] Two of those Justices were of the opinion that capital punishment is *per se* unconstitutional.[3] The remaining three Justices did not reach the question whether the death penalty is unconstitutional in all circumstances. Justice Douglas concluded that the discretionary statutes in question were "pregnant with discrimination" in their operation and thus violated the Equal Protection Clause of the Fourteenth Amendment.[4] Justice Stewart objected to the penalty being applied "so wantonly and so freakishly." [5] Justice White concluded that as the statutes were administered, they violated the Eighth Amendment because the penalty was so infrequently imposed that the threat of execution was too attenuated to be of substantial service to criminal justice.[6]

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[1] A variety of federal statutes currently impose the death penalty. *See* 18 U.S.C. § 34 (destruction of motor vehicles or motor vehicle facilities where death results); 18 U.S.C. § 351 (assassination or kidnapping of a Member of Congress); 18 U.S.C. § 794 (gathering or delivering defense information to aid a foreign government); 18 U.S.C. § 1111 (murder in the first degree within the special maritime and territorial jurisdiction of the United States); 18 U.S.C. § 1716 (causing death of another by mailing injurious articles); 18 U.S.C. § 1751 (murder or kidnapping of a President or Vice President); 18 U.S.C. § 2031 (rape within the special maritime or territorial jurisdiction of the United States); 18 U.S.C. § 2381 (treason); 49 U.S.C. § 1472(i) (aircraft piracy where death results).

In *Gregg* v. *Georgia,* 428 U.S. 153 (1976), the Court reviewed the Georgia statute enacted in response to *Furman* and found it sufficient to overcome Eighth Amendment objections. 428 U.S. at 207.[7] Justices Stewart, Powell, and Stevens found four features of the statute to be particularly important: (1) the sentencer's attention was drawn to the particularized circumstances of the crime and of the defendant by reference to aggravating and mitigating factors; (2) the discretion of the sentencer was controlled by clear and objective standards; (3) the sentencer was provided with all the relevant evidence during a separate sentencing hearing, while prejudice to the defendant was avoided by restricting information on aggravating circumstances to that comporting with the rules of evidence; and (4) there was a system of appellate review of the sentence to guard against arbitrariness, excessiveness, and disproportionality. In a separate opinion, Chief Justice Burger and Justices White and Rehnquist concurred in the judgment. 428 U.S. at 207.

In *Lockett* v. *Ohio,* 438 U.S. 586 (1978) and the companion case, *Bell* v. *Ohio*, 438 U.S. 637 (1978), the Court again considered the constitutionality of a state statute enacted in response to *Furman*. The Ohio statute at issue also set forth the aggravating and mitigating factors to be considered in the imposition of the death penalty. If the case went to trial, however, the law provided that only three mitigating factors could be considered. Without a finding of one of these factors, and with a finding of an aggravating factor, imposition of the death penalty was mandatory. While the Court by a vote of seven to one found the imposition of the death penalty in this case to be unconstitutional, again there was no majority opinion.

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[2] *Furman* v. *Georgia,* 408 U.S. 238, 239–40 (1972).

[3] 408 U.S. at 257 (Brennan, J., concurring); 408 U.S. at 314 (Marshall, J., concurring).

[4] 408 U.S. at 256–57.

[5] 408 U.S. at 310.

[6] 408 U.S. at 312–13.

[7] In companion cases, *Woodson* v. *North Carolina,* 428 U.S. 280 (1976), and *Roberts* v. *Louisiana,* 428 U.S. 325 (1976), a plurality ruled that imposition of mandatory death sentences violated the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments.

Chief Justice Burger and Justices Stewart, Powell, and Stevens based their decision on the conclusion that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[8] Justice Marshall adhered to his view that the death penalty is unconstitutional in all circumstances. Justice Blackmun found that the application of the penalty to an aider and abettor without regard to a specific *mens rea* in relation to the killing would be cruel and unusual. He also found that the statute violated the rule set down in *United States* v. *Jackson,* 390 U.S. 570 (1968), in that it permitted a judge who accepted a guilty plea to avoid imposing the death penalty "in the interests of justice," but authorized consideration of only three mitigating factors if a defendant asserted his constitutional right to a trial.[9] Finally, Justice White objected to the Ohio statute because it included an aider and abettor within the scope of the death penalty without a finding that the defendant "engaged in conduct with the conscious purpose of producing death."[10]

The Court has also held that, in addition to requiring certain procedural safeguards for imposition of the death penalty, the Eighth Amendment bars the death penalty if it is excessive in relation to the crime committed. *Coker* v. *Georgia,* 433 U.S. 584 (1977). In *Coker,* discussed in more detail below, the Court concluded that the death sentence for rape of an adult woman when death did not result was disproportionate to the crime. 433 U.S. at 592.

Recently, the Court again reviewed a death sentence imposed under the Georgia statute. In *Godfrey* v. *Georgia,* 446 U.S. 420 (1980), the Court considered whether the Georgia Supreme Court had adopted such a broad and vague construction of one of the statutory aggravating circumstances as to violate the Eighth and Fourteenth Amendments. The statute provided that a person could be sentenced to death if the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 27–2534.1(b)(7) (Supp. 1975). In the plurality opinion written by Justice Stewart, joined by Justices Blackmun, Powell, and Stevens, the Court ruled that in upholding Godfrey's sentence, the Georgia Supreme Court did not apply a constitutional construction of (b)(7). Justice Stewart stated: "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433. In a concurring opinion, Justice Marshall, joined by Justice Brennan, adhered to his view that the dealth penalty is unconstitutional in all cases, and, in addition, agreed with the plurality that the Georgia Supreme Court's construction of (b)(7) in this case was unconstitutionally vague. He suggested that the sentencing procedures of the type approved in *Gregg* are doomed to failure because the criminal system is incapable of guaranteeing objectivity and evenhandedness in application of the death penalty. Chief Justice Burger and Justices Rehnquist and White dissented, warning that the Court should not put itself in the role of second-guessing state judges and juries.

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[8] *Lockett* v. *Ohio,* 438 U.S. 586, 604 (1978).

[9] 438 U.S. at 613–14, 618–19.

[10] 438 U.S. at 627–28.

II. Constitutionality of the Proposed Statute

The Court's ruling in *Coker,* that the death penalty is unconstitutionally excessive in relation to the crime of rape of an adult woman, raises the question whether the death penalty is excessive in relation to any crime in which death does not result.[11]

In *Coker,* Justice White, speaking for the plurality, characterized the test first enunciated in *Gregg* as: (1) whether the sentence makes a measurable contribution to acceptable goals of punishment; and (2) whether the sentence is grossly out of proportion to the crime. 433 U.S. at 592. The plurality examined the position taken by those states which had reinstated the death penalty after *Furman* and concluded that the modern approach was not to impose the death penalty for rape. It then brought its own judgment to bear on the question of the acceptability of the death penalty under the Eighth Amendment. It reasoned:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition *does not include the death of or even the serious injury to another person.* The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability," *Gregg* v. *Georgia,* 428 U.S. at 187, *is an excessive penalty for the rapist who, as such, does not take human life.*

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[11] In his dissent in *Coker,* Chief Justice Burger wrote: "The clear implication of today's holding appears to be that the death penalty may be properly imposed only as to crimes resulting in death of the victim. This casts serious doubt upon the constitutional validity of statutes imposing the death penalty for a variety of conduct which, though dangerous, may not necessarily result in any immediate death, *e.g.,* treason, airplane hijacking, and kidnapping." *Coker* v. *Georgia,* 433 U.S. 584, 621 (1978).

433 U.S. at 598 (emphasis added). The fact that one of the statutory aggravating circumstances had to be found before the death penalty could be imposed did not convince the plurality that the penalty was not excessive. It wrote that the aggravating circumstances "do not change the fact that the instant crime being punished is a rape not involving the taking of life." 433 U.S. at 599.

Justices Brennan and Marshall concurred separately, reiterating their views that the death penalty is unconstitutional *per se.* Justice Powell concurred in the judgment that the death penalty was not appropriate in this case but dissented from that portion of the plurality opinion which suggested that the death penalty for rape would be excessive in all cases. Chief Justice Burger and Justice Rehnquist joined in dissent.

Under the analysis suggested in *Coker,* in order to determine whether the imposition of the death penalty is constitutional with respect to the offense of attempted assassination of the President, one must determine, first, whether it makes a measurable contribution to acceptable goals of punishment and, second, whether it is excessive in proportion to the crime. While there is as yet no final resolution of the debate over the deterrent effect of the death penalty, we believe that a court would give deference to the legislative judgment on the deterrent effect as long as this judgment appears reasonable.

The second part of the test, whether the punishment is excessive with respect to the crime, is more difficult to apply. In *Coker,* the Court looked to the consensus among the states and the practice of juries in modern times, as well as to historic practice, to assess the relationship between the penalty and the offense. This inquiry is more difficult with respect to a crime as rare as attempted assassination of the President. We approach the issue by considering five factors that bear on the inquiry mandated by *Coker.* Those factors are: (1) the general definition of "attempt"; (2) the historical approach to "attempt" crimes, especially murder; (3) the federal and state practice with respect to attempted murder of the President; (4) the international treatment of attempted assassination of national leaders; and (5) the special position of the President of the United States.

A. *Definition of attempt.* We do not have before us a definition of the kinds of attempts on the life of the President to which the death penalty would be applied. A wide range of conduct might constitute an attempted murder. Different mental states and different conduct, marking varying degrees of progress toward the completion of the crime, might be comprehended within the definition. *See* S. Kadish & M. Paulsen, Criminal Law and its Processes: Cases and Materials 368–410 (1969). Under the Model Penal Code, for example, "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

> (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) when causing a particular result is an element of the crime, does . . . anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part; or
>
> (c) purposely does . . . anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Model Penal Code, Proposed Official Draft § 5.01(1), (1962). To constitute a "substantial step" under § (1)(c), the step must be "strongly corroborative of the actor's criminal purpose."

In our view, a statute making it a capital offense to attempt to assassinate the President will be much more likely to be held constitutional if it covers a limited category of situations in which the attempt has nearly succeeded and the defendant's intent is unmistakable. *See Lockett* v. *Ohio,* U.S. 438 at 627–28 (White, J., concurring) (intent to murder must be shown to justify imposition of death sentence). For this reason, we believe that the Court would be much more likely to uphold the application of the death penalty to conduct falling within categories (a) and (b) above than (c). At the same time, we do not exclude the possibility that conduct falling within (a) or (b) might itself not be subject to capital punishment under the Eighth Amendment, especially if the crime was not in fact nearly completed. For purposes of the following discussion, we assume that any statute to be enacted by Congress would be narrowly drawn and limited to cases of unambiguous motive and near-completion of the assassination effort.

B. *Attempted murder in general.* Anglo-American law has traditionally subjected crimes of attempt, including attempted murder, to a lower penalty than the completed crime. At common law, all attempts were classified as misdemeanors. W. Clark & W. Marshall, A Treatise on the Law of Crimes 178 (2d ed. 1905). Under current statutory provisions, an attempt is ordinarily punishable by a reduced factor of the punishment for the completed crime. S. Kadish & M. Paulsen, *supra,* at 368 (1969). A few states make the punishment for the completed crime the same as for attempts, but even those states reduce an attempt to commit a capital offense to a term of imprisonment. *Id.* Under the Model Penal Code, an attempt is generally a crime of the same grade and degree as the substantive offense, but an attempt to commit a capital crime or a first-degree felony is a felony of the second degree. Model Penal Code § 5.05(1) (Proposed Official Draft 1962). Our review indicates that none of the states now having capital punishment laws classifies attempted murder as an offense subject to the death penalty.

This pattern apparently reflects a deeply seated social conception that attempted crimes should not be punished as severely as substantive offenses. That conception has been said to result from a number of factors. First, if the purpose of punishment is retribution, that purpose points toward a less severe sanction for attempts. *See* Waite, The Prevention of Repeated Crime 8–9 (1943). Second, if the act has not been carried out, there is inevitably some room for uncertainty as to the actor's true motives. Finally, it has been doubted whether the threat of punishment for attempts will add significantly to the deterrent effect of the sanction threatened for the substantive offense which, by hypothesis, the actor has ignored. Model Penal Code, comments to § 5.05 (Tent. Draft No. 10, 1950).

These factors, when considered in conjunction with the historical practice of penalizing attempts less severely than substantive offenses, suggest that, under *Coker*, a capital punishment law for attempted murder may well be invalidated. The objective factors relied on by the Court indicate that the retributive and deterrent goals of punishment point toward a more severe penalty for murder than for attempted murder.

It should be noted, however, that attempted murder of the head of state was punished quite severely at common law. In England, an attempt on the life of the King was regarded as a form of common law treason and thus punishable by death. W. Burdick, The Law of Crime, § 231 (1946); R. Perkins, Criminal Law 441 (1969); W. Clark & W. Marshall, *supra*, at 7. The Statute of Treasons, enacted in 1351, included a manifested desire for the death of the King as an act of high treason. The American Constitution, however, contains provisions designed to limit the definition of the crime, stating, "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. Const., Art. III, § 3. The offense of attempting to assassinate the President has not, to our knowledge, been thought to fall within this language.

C. *Historical practice in America.* The first federal statute making it a federal crime to assassinate or to attempt to assassinate the President was passed in 1965. 18 U.S.C. 1751. Under that provision, the maximum sentence for an attempt on the life of the President is life imprisonment. Accordingly, the federal government has not, as an historical matter, made it a capital offense to attempt to assassinate the President. This factor would be cited to support the argument that a death penalty for such an attempt is unconstitutional under the Eighth Amendment. It is not, however, dispositive. Moreover, since no provision of federal law prior to 1965 governed assassination of the President, Congress did not before that time conclude that a person convicted of an attempted assassination should *not* be subject to the death penalty.

Since no federal law governed assassination or attempted assassination of the President before 1965, several states enacted provisions on the subject. Our preliminary [12] research indicates, however, that very few states made it a capital offense to attempt to assassinate the President. Only Connecticut, Ohio, and probably New Jersey had such laws in 1967, before the *Furman* decision. H. Bedau, The Death Penalty in America 48–52 (rev. ed. 1967). There is, therefore, only minor support for the position that, in the United States, attempted assassination of the President has been regarded as a crime for which the death penalty is appropriate.

D. *International practice.* The Economic and Social Council of the United Nations undertakes a report on the capital punishment laws of its members every five years. The last report, completed in 1980, contains somewhat vague and incomplete data compiled on the basis of the replies from 74 member states (of a total current membership of 154). Of the countries responding, only nine stated with clarity that those committing the offense of attempted assassination of the head of state were subject to capital punishment: Morocco, Tunisia, Indonesia, Belgium, Mozambique, Philippines, Thailand, Nepal, and France.[13] If correct, these data suggest that a small percentage of the nations with capital punishment laws apply those laws to attempts on the head of state. Although not binding on the Court's interpretation of the U.S. Constitution, that fact would count as a factor in determining whether an attempted assassination of the President may be subjected to capital punishment, for it suggests a general international position that a person who has only attempted to assassinate a head of state should not be executed.

E. *Nature of crime.* Finally, we consider the nature of the crime involved here: An attempted assassination of the President. As the most powerful and visible of the Nation's leaders, the President maintains a unique position within the federal government. As Commander-in-Chief of the Armed Forces, he discharges unique responsibilities for the security of the country. As head of the Executive Branch, he is entrusted with the authority of coordinating and executing all laws of the United States. For these reasons, an assault on the President threatens the national security in a distinctive fashion. Even if the attempt is unsuccessful, it may produce a national sense of embarrassment, fear, or trauma. An attempt on the life of the President is, as a result, different in kind, not merely in degree, from an attempt on the life of any other public or private citizen. In this respect, the President is a "legitimate class of one." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 472 (1977).

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[12] Since the available historical materials are generally vague, we cannot exclude the possibility that our data is incomplete.

[13] Numerous others, however, included treason as a capital offense. If treason were defined to include attempted assassination of the head of state, the number would be significantly higher. That information, however, is not currently available. U.N. Economic and Social Council, *Capital Punishment: Report of the Secretary General,* para. 34, U.N. Doc. E/1980/9 (1980); para. 4, U.N. Doc. E/1980/9/Add. 1 (1980).

We believe that the unique nature of the office of the President of the United States furnishes support for the view that an attempted assassination of the President can be subjected to the death penalty. More than any other attempt crime, an attempt on the life of the President causes injury to the country even if it is unsuccessful. There is a substantial governmental interest in avoiding the national injury that is produced simply by virtue of an attempt on the President's life.

III. Conclusion

The foregoing discussion suggests that, under *Coker*, a statute making it a capital offense to attempt to assassinate the President would raise quite serious constitutional questions. Throughout American history, attempt crimes have been punished less severely than substantive offenses. Although an assassination attempt was within the definition of treason in England, it has not been so regarded in the United States. No American jurisdiction currently applies the death penalty to an attempted murder. The only federal statute governing attempted assassination of the President was enacted in 1965 and carries a maximum sentence of life imprisonment. On the basis of the evidence now available to us, it appears that only a handful of states applied the death penalty to attempt on the life of the President before *Furman*. Finally, although the evidence is somewhat vague, it seems that relatively few countries, even among those that retain the death penalty, punish with death the offense of attempting to assassinate the head of state.

On the other hand, such an attempt is undoubtedly a grave offense and amounts to an assault on the security of the Nation; this indicates that a narrowly drawn statute might be upheld against an attack on the basis of *Coker*.

Taken together, these factors suggest that a broadly drawn death penalty for attempts on the life of the President would be unlikely to survive constitutional challenge. Any such statute should be narrowly drafted to include cases in which the defendant's intent was unambiguous and the crime was almost completed. Such a statute would be more likely to be upheld if an element of the crime was the actual commission of some bodily injury to the President.

We believe that, if a capital punishment statute were drafted to include such injury as part of the offense, or possibly even if it were otherwise narrowly confined to nearly successful attempts, the statute might well be found constitutional. The fact that England and a number of other countries have historically applied the death penalty to an attempted murder of the head of state, together with the distinctive responsibilities of the President in our constitutional scheme, do, in our view, provide support for a conclusion that the death penalty for an attempt on the life of the President is not disproportionate within the meaning of *Coker.* We must caution, however, that the constitutional question is a serious and difficult one, and that our position is necessarily tentative in light of the inconclusive nature of the Supreme Court's guidance.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Payment of Legal Fees in Connection With a Cabinet Member's Confirmation Hearings

Legal expenses incurred in connection with a Cabinet member's Senate confirmation hearings would be an appropriate subject of payment from funds authorized under the Presidential Transition Act, and may also, consistent with that Act, be paid from private sources.

Payment of legal fees incurred in connection with the confirmation process by a private foundation would not be considered to supplement a Cabinet member's salary in violation of 18 U.S.C. § 209, since the purpose and value of the services rendered were directed primarily to the government.

May 13, 1981

MEMORANDUM OPINION

Our views have been requested on the propriety under 18 U.S.C. § 209 of a proposed payment by a private foundation[1] of legal fees incurred in connection with the Senate confirmation hearings of a member of the Cabinet. We understand that the lawyer was retained after consultations between the office of the President-elect and a Member of Congress, and that the lawyer's fee is not and was never intended to be the personal obligation of the nominee. We also understand that the lawyer's services were rendered before and during the nominee's confirmation hearings and that all services were rendered before the current Administration took office.

Our conclusions can be summarized as follows:

(1) The payment of legal fees incurred in connection with a confirmation hearing serves a legitimate governmental function cognizable under the Presidential Transition Act.

(2) The availability of public funding under the Transition Act does not preclude additional transition funding from private sources.

(3) Since the purpose and value of these legal services were directed primarily to the government, payment of the legal fee by a private party should not be considered a supplementation of the employee's salary for purposes of 18 U.S.C. § 209.

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[1] According to its bylaws, the foundation is a nonprofit corporation established in the District of Columbia "to facilitate an orderly transfer of the power of the executive branch of the United States government from the Administration of the incumbent President to the Administration of the President-elect . . . ."

Before addressing the propriety of this proposed payment under § 209, we will examine it in light of the Presidential Transition Act of 1963, Pub. L. No. 88–277, 78 Stat. 153, *as amended* by Pub. L. No. 94–499, 90 Stat. 2380, October 14, 1976 (reprinted in note following 3 U.S.C. § 102). This Act promotes the orderly transfer of executive power during a presidential transition by authorizing the Administrator of the General Services Administration (GSA) to provide to a President-elect necessary services and facilities for use prior to January 20 in connection with preparations for the assumption of official duties. The GSA Administrator is specifically authorized, by § 3(a)(3) of the Transition Act, to pay expenses for the services of consultants,[2] and we see no reason why a legal consultant of this type could not have been paid with government funds pursuant to the Transition Act.[3]

The availability of Transition Act funds for a particular purpose does not necessarily preclude the funding of that same function from a private source. Although the Comptroller General has issued a considerable body of opinions generally repudiating the unauthorized augmentation of agency appropriations, *see, e.g.*, 46 Comp. Gen. 689 (1967), we do not think that those opinions are controlling in this situation. Neither the President-elect nor his transition staff are government employees,[4] and the Transition Act does not create a federal transition agency. Instead, it provides for the appropriation of money to a federal agency (GSA), to be disbursed according to certain criteria. There is no indication in the Transition Act or its legislative history that demonstrates a congressional intent to limit a President-elect's transition activities to those funded by the GSA transition appropriation.[5] In fact, when the Act was amended in 1976 to increase the amount of the authorization for transition funds, the House report quoted extensively from a GAO study that showed that in the past only a small portion of the actual transition expense was paid from the U.S. Treasury. In recommending that the appropriation be increased,[6] the GAO report stated:

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[2] The Transition Act provides that consultants shall be paid pursuant to the Administrative Expenses Act of 1946, *as amended* (5 U.S.C. § 3109). Among other things, this Act places a ceiling on the salary rate paid to consultants. This salary limitation clearly would apply if the lawyer's fees were paid by GSA.

[3] Had the same legal services been required *after* the Administration took office, they might have been provided by government lawyers or by private lawyers retained at government expense. Although the use of government funds or personnel to assist nominees in the confirmation process would depend upon the language and purpose of relevant appropriation statutes, as a general matter, such expenditures have been considered necessary government expenditures.

[4] *See* § 36(a)(2) of the Transition Act *supra*. Of course, federal employees who are "detailed" to assist the President-elect in transition do retain their status as federal employees.

[5] There is little doubt that Congress did intend to limit *federal* transition expenditures to the amount authorized and appropriated to the GSA for this purpose. *See, e.g.*, S. Rep. No. 1322, 94th Cong., 1st sess. 2 (1976).

[6] It should be noted that even the increased appropriation would not have covered the full expenditures of the immediately preceding transition as reported by GAO.

> It is our belief, however, that if the Presidential Transition Act is to function as intended, the Federal assistance must cover a *substantial part* of the Transition expenses.

Quoted in H. Rep. No. 1442, 94th Cong., 1st Sess. 4 (1976) (emphasis added). It is clear from the House report that Congress was aware of the custom of augmenting the transition appropriation with private funds. Since neither the Act nor its legislative history indicate an intent to eliminate this practice, and in light of the language adopted from the GAO report, we conclude that the public funding of transition was not intended to preclude private funding of transition activities.

We now turn to the question of whether the payment of this particular transition expense by a private group would violate 18 U.S.C. § 209. As you know, § 209 prohibits the payment or receipt from any source other than the government of any salary, contribution to or supplementation of salary, as compensation for the services of an officer or employee of the Executive Branch. The term salary is not defined by the statute.

One source of guidance on the meaning of "salary" in § 209 is the administrative interpretations given to the term by the various federal agencies. This administration case law tends to give fairly broad meaning to the term "salary,"[7] but it does not supply an answer or a ready formula to apply in this case. In the final analysis, the determination whether a particular fringe benefit constitutes "salary" is a matter of judgment based on the full circumstances and intent of the parties. *See* 41 Op. Att'y Gen. 217 (1955).

In this case, it is our judgment that the proposed payment would not constitute a supplementation of the employee's salary. In reaching this conclusion we note that the foundation's primary purpose to assist the President-elect is evident from its very charter; that this purpose is a legitimate function for a private foundation;[8] and that the foundation is not, and has never been, in an employment relationship with the member of the Cabinet. Furthermore, we are convinced that any personal benefit to the employee from these legal services was incidental and secondary to the intended benefit conferred upon the President-elect and his Administration. In addition, if the government had provided these same legal services (*see* text accompanying footnote 3) it is doubtful that the value of the services would be considered part of the employee's salary.

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[7] *See* discussion in B. Manning, Federal Conflict of Interest Laws 160–163 (1964), reviewing administrative decisions that define salary to include tuition fees, travel and professional expenses, and various honoraria *See also* 18 U.S.C. § 209(e), which creates a narrow exception to the administrative decision that § 209 bars the payment of moving expenses by a former employer.

[8] As discussed previously, the foundation's purpose to assist the transition is not at odds with the Transition Act of 1963 or the principle of fixed appropriations. We also note that in Advisory Opinion 1980–97 the Federal Election Commission (FEC) concluded that the establishment of a Presidential Transition Trust to pay for pre-election transition activities was lawful under the Federal Election Campaign Act of 1971 and FEC regulations.

There is a line of Comptroller General decisions holding that an officer or employee has on his shoulders "the duty of qualifying himself for the performance of his official duties." 22 Comp. Gen. 460, 461 (1942). *See also* 51 Comp. Gen. 701 (1972) (disallowing the government's payment of bar admission fees) and 31 Comp. Gen. 465 (1952), 22 Comp. Gen. 243 (1942) (both disallowing government payment for pre-employment medical examinations). In our view, legal fees incurred in connection with the confirmation process are not analogous to these other personal costs of job qualification. As discussed earlier, the confirmation process involves overriding governmental interests of a magnitude not present in the decisions cited above. In addition, the cited Comptroller General decisions involve expenditures that benefit the employee in a personal capacity, while the legal services at issue will benefit the employee primarily in an official capacity.

For reasons stated above, we conclude that the proposed payment of legal fees by a private foundation would not violate 18 U.S.C § 209.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Constitutionality of Repealing the Employee Protection Provisions of the Regional Rail Reorganization Act

Congress may modify or repeal altogether the income protection program enacted by Title V of the Regional Rail Reorganization Act of 1973, under which the Consolidated Rail Corporation (Conrail) was given responsibility for paying employee benefits under existing collective bargaining agreements between its five component railroads and their unions. Such action would not result in any constitutionally compensable "taking" from railroad employees, or impair any private contract rights in violation of the Due Process Clause.

Railroad employees have no present vested interest in the benefits specified in Title V whose abrogation or modification would be restricted by the Fifth Amendment, since by their nature those benefits are entirely prospective.

Congress may interfere with vested property rights, or impair a contract between two private parties, as long as the results are not harsh and oppressive, in light of the governmental interests served by the legislation. Moreover, a legislative measure interfering with contract rights is more likely to be held constitutional if it is one of a long series of actions regulating the business in question.

One Congress cannot legislate so as to divest itself or subsequent Congresses of the right and responsibility to exercise the full legislative authority to enact laws for the common good.

May 13, 1981

MEMORANDUM OPINION FOR THE CHIEF COUNSEL, FEDERAL RAILROAD ADMINISTRATION

This responds to your request for our opinion on the constitutionality of repealing Title V of the Regional Rail Reorganization Act of 1973, *as amended*, 45 U.S.C. §§ 771–80 (the Rail Act), and enacting in its stead a more limited program of employee protection emphasizing severance payments rather than continuing monthly displacement allowances.[1] This proposed legislative action has been opposed by representatives of organized rail labor on the ground that it would deprive railroad employees of vested property rights in violation of the Fifth Amendment to the Constitution. You also ask whether Congress may, consistent with the Fifth Amendment, relieve the Consolidated Rail Corporation (Conrail) of certain obligations it may have to its employees under existing collective bargaining agreements. We conclude that the Fifth Amendment poses no obstacle to the repeal of Title V, and that Congress may at the same time terminate or modify any analogous contractual obligations which Conrail may have towards its employees under collective bargaining agreements.

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[1] While you do not describe in detail the program which is proposed to replace Title V, we have made some general assumptions about it based on the Department of Transportation draft bill entitled "Rail Service Improvement Act of 1981." *See infra.*

Our discussion begins with a brief review of the historical background of the enactment of Title V in 1973 and a summary of its most significant provisions. We then examine how the Fifth Amendment might be implicated in any repeal or substantial modification of those provisions.

I. Factual Background

The Rail Act was enacted in 1973 in response to a crisis in northeast rail service which saw the eight major regional rail carriers all undergoing contemporaneous reorganization under the bankruptcy laws. Congress attempted to resolve this crisis by creating Conrail, a private, for-profit corporation authorized to purchase the assets of the bankrupt carriers and carry on their services, initially with federal assistance but eventually on a financially self-sustaining basis. *See Regional Rail Reorganization Act Cases,* 419 U.S. 102, 109–17 (1974). One of the most difficult problems faced by Congress in its efforts to accomplish this restructuring was rail labor's insistence on the continuation and strengthening, under its new employing entity Conrail, of the contractual protections rail employees had enjoyed under collective bargaining agreements with the eight bankrupt carriers. The solution eventually agreed upon was to make these protections binding on Conrail by incorporating them into the Rail Act itself as Title V.

The specific provisions of Title V were developed in negotiations, conducted at the behest of the Administration with the concurrence of congressional leaders, between representatives of rail labor unions and rail management.[2] The resulting hybrid approach to labor protection supplemented the contractual guarantees ordinarily secured by rail employees under § 5(2)(f) of the Interstate Commerce Act,[3] with a statu-

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[2] This method of developing legislation, perhaps unique for the candor with which it was acknowledged in subsequent hearings and debates, is described in *Northeastern and Midwestern Rail Transportation Crisis: Hearings on S. 2188 and H.R. 9142 Before the Subcommittee on Surface Transportation of the Senate Commerce Committee,* 93d Cong., 1st Sess. 958–960 (1973) (Senate Hearings) (testimony of Stephen Ailes, President of the Association of American Railroads). *See also* 119 Cong. Rec. 36343, 37353, 36375, 40711, 40717 (1973).

[3] Section 5(2)(f), 49 U.S.C. § 5(2)(f), *recodified without substantive change* as 49 U.S.C. § 11347 (Supp. II 1978), was added to the Interstate Commerce Act by the Transportation Act of 1940, ch. 722, 54 Stat. 898 (1940). It requires as a condition to the grant of a merger, consolidation, or acquisition that labor protection be guaranteed for a certain period (originally four, but now more generally six years) from the effective date of the transaction. In *ICC* v. *Railway Labor Ass'n,* 315 U.S. 373 (1942), the Supreme Court noted that the effect of the 1940 amendments was to make mandatory the protection of workers which had been discretionary under the 1936 Washington Job Protection Agreement between the carriers and rail unions. The "Washington Agreement" became the blueprint for a series of standard employee protections more or less routinely imposed by the Interstate Commerce Commission (ICC) in the event of any "joint action" by two or more rail carriers. *See* discussion and cases cited in *New York Dock Railway* v. *United States,* 609 F.2d 83 (2d Cir. 1979). *See also* H.R. Rep. No.

Continued

tory specification of Conrail's obligations in particular areas to the employees of the carriers it was absorbing.[4] Conrail itself was made subject to the Railway Labor Act by § 502(a) of the Rail Act, and required by § 504(a) to assume all obligations of acquired railroads under existing collective bargaining agreements except those relating to job stabilization. These latter were "superseded and controlled" by the detailed specifications of § 505, which included provisions for "monthly displacement allowances" (MDA's), separation and termination allowances, and a variety of transfer benefits. Section 509 made Conrail financially responsible for the payment of all allowances paid to employees pursuant to the Act, though provision was also made for reimbursement of those costs to Conrail from federal funds specially appropriated to the Railroad Retirement Board, in an aggregate amount not to exceed $250 million.[5]

The job stabilization provisions spelled out in § 505, particularly the monthly displacement allowances, are at the heart of what is now proposed to be changed in the Rail Act. It is therefore important to review at least briefly their history and substance.

At the time the Rail Act was being considered by Congress, most employees in the railroad industry were protected against loss of employment by provisions in collective bargaining agreements modeled on the 1936 Washington Job Protection Agreement. *See* note 3, *supra.* Under these agreements, layoffs as a result of a merger or other joint action were permitted, but protected employees were entitled to a "monthly displacement allowance" for a certain period afterwards (usually six years) while out of work. Most of the employees of the eight bankrupt northeastern carriers, however, enjoyed an assurance, derived from the Penn Central Merger Agreement of 1964, against loss of employment or reduction in compensation except in the most drastic circumstances of business downturn.

The extraordinary lifetime job security feature of the Penn Central Merger Agreement was the subject of considerable discussion during hearings in the Senate, where participants were virtually unanimous in stressing the importance of incorporating some equivalent protections in the restructuring program. *See, e.g.,* Senate Hearings, *supra* note 2, at 821–24 (colloquy among Department of Transportation officials and

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1035, 96th Cong. 2d Sess. 139–45 (1980) (Staggers Rail Act of 1980). Under the Interstate Commerce Act, the actual terms of employee protection provisions are ordinarily negotiated between the rail carrier and its unions, subject to the approval of the ICC.

[4] Compare this substantive specificity with § 405 of the Rail Passenger Service Act of 1970 (the Amtrak Act), 45 U.S.C. § 565(b), which provides that employee protective arrangements negotiated between carriers and unions "shall in no event provide benefits less than those established pursuant to [§ 5(2)(f)]."

[5] The original authorization of $250 million to reimburse Conrail for the cost of labor protection has been exhausted. The Staggers Rail Act of 1980, Pub. L. No. 96–448, 94 Stat. 1895 (1980), modified certain of the provisions of § 505 to reduce the benefits available to employees, and authorized an additional $235 million to reimburse Conrail. We understand that not all of this amount has been appropriated, however, and that Conrail has not been reimbursed for recent labor protection payouts.

Senators Beall and Cook); 972–73 (testimony of Graham Claytor, President, Southern Railway System). In both House and Senate committee reports it was emphasized that railroad employees should not be required to bear a disproportionate share of the cost of continuing rail service in the northeast under Conrail. *See* H.R. Rep. No. 620, 93d Cong., 1st Sess. 58 (1973) ("the cost of employee protection in the restructuring of the rail system should be a social cost, borne by the federal government"); S. Rep. No. 601, 93d Cong. 1st Sess. 13–14 (1973) (describing Title V as "[p]roviding for these costs as an integral part of the restructuring effort . . . ."). The perception that employees of the bankrupt carriers to be acquired by Conrail enjoyed "vested rights" to permanent job security was shared by a number of active participants in the debates on the legislation in the House and Senate. Legislators supporting enactment of the negotiated protective provisions stressed what they perceived as the government's moral and legal obligation to offer employees displaced by the restructuring at least as much protection as they had had under the superseded collective bargaining agreements. *See* 119 Cong. Rec. 36375 (1973) (remarks of Rep. Staggers); 119 Cong. Rec. 40729–32 (1973) (remarks of Sen. Hartke).

The Statutory provisions negotiated by rail labor unions and management as a replacement for these "vested rights" gave Conrail employees the best of both worlds: the job stabilization provisions of § 505 grafted the open-ended lifetime employment assurance of the Penn Central Merger Agreement onto the heretofore limited concept of displacement allowances under the Washington Agreement. Thus, Conrail employees laid off or furloughed for any reasons and at any time were statutorily entitled to receive monthly displacement allowances until retirement.[6]

In 1980, the employee protection provisions in Title V were modified to eliminate some windfall benefit provisions, and generally to reduce the benefits available to certain classes of employees. *See* Pub. L. No. 96–448, 94 Stat. 1895 (1980). The legislation presently proposed by the Administration would effect a more basic change in the job stabilization structure established by the Act, replacing the monthly displacement allowances mandated by Title V with a scheme of severance payments. Conrail would remain bound by the terms of its existing labor contracts, and bound by the Railway Labor Act to bargain with its employees on all otherwise negotiable terms and conditions of employment, except those withdrawn from the bargaining process by statute. As under present law, no collective bargaining agreement could include provisions relating to job stabilization which exceed or conflict with those established by statute. *See* 45 U.S.C. §774(d). In short, the proposed legislation would eliminate rail employees' statutory entitlement to a monthly displacement allowance during periods of lay-off, and preclude their regaining this entitlement through the bargaining process.

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[6] Under § 505(b) of the Rail Act, Conrail must pay to any protected employee who has been deprived of employment or adversely affected with respect to his compensation a monthly allowance in the full amount of his average monthly compensation for the preceding 12 months, including overtime, adjusted periodically to reflect subsequent general wage increases. The employee remains entitled to receive this allowance until he reaches age 65, though he must always remain available to return to work on peril of losing his entitlement. As an alternative, a protected employee may elect to resign and receive a lump-sum separation payment of as much as a year's salary. *See* § 505(e) and (f). In addition, Conrail employees transferred by the company are entitled to moving expenses, including compensation for any loss associated with the sale of an old home or the purchase of a new one. *See* § 505(d) and (g).

II. Fifth Amendment Issues Raised by the Proposed Repeal of Title V

Constitutional objection to the repeal or substantial modification of Title V would, we assume, be based on the Due Process or Just Compensation Clauses of the Fifth Amendment:[7]

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

These two clauses together place limits on Congress' power to structure and adjust economic benefits and burdens, either directly through the imposition of a regulatory system, or indirectly through the modification of existing contractual relationships including those to which the United States is a party.[8]

Where the constitutionality of legislation is at issue, the analysis under either the Due Process or Just Compensation Clause generally focuses on the source of Congress' power to legislate, the nature of the claimed legal interest, the way in which it is affected by the government's action, and the importance of the governmental purpose served.

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[7] Changes in the protections afforded employees under Title V might also be subject to challenge on equal protection grounds. *See Hinds* v. *Conrail*, 518 F. Supp. 1350 (E.D. Mich. 1981) (suit challenging 1980 amendments to Title V as unfairly discriminatory against nonoperating employees). For such a challenge to succeed, it would be necessary to show that any benefit differentials among classes of employees are "patently arbitrary or irrational." *See U.S. Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980). We see no reason to believe that there would be any substantial basis for such a challenge to the amendments proposed here.

[8] The analysis which the Court has employed in contract impairment cases is similar to that employed in "taking" cases. The answer to the question whether and under what circumstances Congress may abrogate or modify rights arising under a contract between two private parties, or between a private party and the federal government, generally also disposes of the question whether there has been a constitutional "taking." Thus, a failure adequately to compensate for a governmental taking will often be analyzed as a failure of due process, either procedural or substantive. *See, e.g., Lynch* v. *United States*, 292 U.S. 571, 579 (1934) (Due Process Clause prohibits United States from abrogating its own valid contractual undertakings). Conversely, property rights may be "taken" without compensation "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978). *See* Sax, *Takings and The Police Power*, 74 Yale L. J. 36, 61–62 (1964). In *Louisville & Nashville R.R. Co.* v. *Mottley*, 219 U.S. 467 (1911), the Supreme Court explained that property rights, including contractual property rights, are always "subject to the lawful demands of the Sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government . . . ." 219 U.S. at 482, quoting from *Knox* v. *Lee*, 12 Wall. 457, 550–51 (1870).

In this case, Congress' power under the Commerce Clause to regulate employment relationships in the railroad industry is not disputed, nor is the importance of the government's interest in Conrail's solvency. Rather, the constitutional question turns on the nature of the rail employees' claimed interest in Title V benefits. Representatives of the rail unions characterize the employees' interest in Title V benefits as a "vested property right," obtained as compensation for relinquishing in 1973 their rights under the Penn Central Merger Agreement, and thus in the nature of a contract with the federal government itself which cannot be unilaterally altered.[9] In the view of the General Counsel of the Interstate Commerce Commission, the employees' interest in Title V benefits is most properly characterized as derived from and dependent upon their contractual relationship with the private entity Conrail.[10] Finally, Title V has been characterized as a "public benefit" program or "statutory entitlement" analogous to those established under the Social Security and Railroad Retirement Acts, and alterable for all practical purposes at the will of Congress.

While we do not find any of these characterizations a perfect fit, we think the last-mentioned comes closest to providing the correct framework for purposes of constitutional analysis. The fact that Congress in 1973 was willing to assure rail employees of some measure of income protection with their new employer, Conrail, does not lead inescapably, or even logically, to the conclusion that Congress was constitutionally *required* to do so. It is demonstrably not the case that the passage of the Rail Act in 1973 interfered with contract rights between the bankrupt railroads and their employees. The Rail Act simply created an opportunity for the railroads to sell their assets and operating rights to Conrail, free of the most burdensome aspects of their labor agreements. We have no doubt that it is within Congress' power to withdraw regulatory protections imposed by an agency pursuant to a statute (in this case the

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[9] *See* undated memoranda entitled "Preliminary Memorandum—Legal Effects of Repeal of Title V of the 3R Act," and "Response to ICC Memorandum. . ." prepared by Highsaw & Mahoney, P.C., on behalf of the Railway Labor Executives' Association. We do not understand these memoranda to argue that Conrail employees have a compensable property interest in Title V benefits *independent* of the events of 1973. By their nature, MDAs and other Title V allowances are entirely prospective, and thus may be altered or eliminated without raising a Fifth Amendment problem. *Cf. Bell* v. *United States,* 366 U.S. 393 (1961). Because availability for active employment is a condition of continuing eligibility for MDAs and the other statutory allowances provided in Title V, they must be regarded as compensation for present rather than past services. A rail employee's interest in displacement allowances may thus be analogized to the interest of a retired military officer serving in the active reserve in his retirement pay. *See Abbott* v. *United States,* 200 Ct. Cl. 384 (1973); *Akerson* v. *United States,* 175 Ct. Cl. 551, *cert. denied,* 385 U.S. 946 (1966). The case of *United States* v. *Larionoff,* 431 U.S. 864 (1977) is thus inapposite, at least insofar as it indicates that an employee who performs services in reliance upon a government promise to pay a certain sum is constitutionally entitled to be paid that amount.

[10] Memorandum from the General Counsel to the Acting Chairman, March 12, 1981, "Constitutionality of Legislation Amending Title V of the Regional Rail Reorganization Act of 1973. . . ." We understand the General Counsel's argument to be that Title V was intended by Congress to create a contractual obligation on the part of Conrail towards its employees; therefore, analysis of its repeal or modification by Congress would be similar to that applicable to the legislative impairment of a purely private contract between Conrail and its unions. *See* part III, *infra.*

ICC's longstanding requirement that the cost of existing labor agreements be included in a sale of assets). What Congress chose to substitute for the ICC's requirement was a statutory income protection program whose benefits, like those paid under the Social Security and Railroad Retirement Acts, "are not contractual and may be altered or even eliminated at any time." *U.S. Railroad Retirement Board* v. *Fritz,* 449 U.S. at 174. Railroad employees thus have no constitutionally compensable property right in Title V benefits, and no expectation of their continuance whose unsettling offends substantive due process. *See Flemming* v. *Nestor,* 363 U.S. 603, 608–11 (1960) (Social Security annuitants have no vested rights to receive benefits). *See also Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 575 (1979) (similar treatment of Railroad Retirement benefits). Modification of the benefits scheme mandated by Title V is well within Congress' power to "adjust[ ] the burdens and benefits of economic life" in a reasonable manner, even if it thereby "upsets otherwise settled expectations." *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 16–17 (1975).[11]

Indeed, we believe the Fifth Amendment claims of Title V beneficiaries are even less compelling than those of Social Security Act and Railroad Retirement Act annuitants, since Title V benefits—and their proposed alteration—operate in an entirely prospective fashion. *See* note 9, *supra.* The Supreme Court has indicated that the Due Process Clause requires measures that interfere with rights previously acquired to be more strongly justified than legislation which effects mere expectations. *See Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. at 17; *Railroad Retirement Board* v. *Alton R. R. Co.,* 295 U.S. 330, 348–50 (1935). But even if the interest of rail employees in Title V benefits were thought as substantial as the interest of annuitants under the Social Security and Railroad Retirement Acts, they would be entitled to protection only from "patently arbitrary" congressional action, action which is "utterly lacking in rational justification." *Flemming* v. *Nestor,* 363 U.S. at 611. We have no reason at this point to doubt Congress' ability to frame legislation which would meet that test.

As noted above, we do not believe Title V creates a present property interest in rail employees which would be enforceable against the federal government through either the Due Process or Just Compensation Clauses. We recognize, however, that there is support in the legislative history of the Rail Act for a theory that Congress intended Title V benefits as compensation for employees' loss of private contract rights under the Penn Central Merger Agreement. There is also some support for a theory that Title V was enacted in consideration of the rail unions' promise not to strike or otherwise disrupt the restructuring effort, and that it therefore constitutes a sort of legislative contract which Congress may not unilaterally abrogate or even alter without adequate compensation.[12]

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[11] We do not think it is material to this analysis whose responsibility it may be under a statute for the actual payment of benefits. As previously noted, Congress expressly made a non-government entity, Conrail, responsible for paying Title V benefits, though it also agreed to underwrite some portion of Conrail's costs in this respect. Similarly, under the Black Lung Benefits Act held constitutional in *Turner Elkhorn,* the federal government assumed responsibility for paying certain claims, and assigned to the states and to the mine operators responsibility for paying others. Benefits paid out under the Social Security and Railroad Retirement Acts have a similarly hybrid source. Under none of these statutes did the substantive validity of a beneficiary's claim depend upon who ultimately could be made to pay it; the fact that the entitlement was assured in a federal statute was sufficient to establish the constitutional issue. In any event, the fact that Conrail, rather than the federal government, is responsible under the statute for paying claims cannot be said to strengthen the case *against* Congress' present authority to modify Conrail's obligations. *Cf. Lynch* v. *United States, supra,* 292 U.S. 571.

With respect to the latter theory, we think it clear that under the Constitution one Congress cannot legislate so as to divest itself or subsequent Congresses of the right and responsibility to exercise the full legislative authority to enact laws for the common good. *See Pennsylvania Hospital* v. *Philadelphia,* 245 U.S. 20, 23 (1917). *See also Home Building & Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 435 (1934) ("the reservation of essential attributes of sovereign power is . . . read into contracts as a postulate of the legal order."). Those cases in which the United States has been held to the performance of its part of a contract authorized under a law of Congress, *e.g., Lynch* v. *United States, supra,* 292 U.S. 571, and *Perry* v. *United States,* 294 U.S. 330 (1935), cast no doubt on this fundamental principle of government. Both *Lynch* and *Perry* involved contracts entered into by the United States extrinsic to the law which authorized them, under which claimants were found to have vested property rights. We know of no instance in which Congress was held to be disabled from legislating under one of its enumerated powers because of a proposed new law's effect on some expectation of future benefits arising under existing law. Indeed, we know of no situation in which legislation by itself was held to confer a contractual benefit.[13] And, even when dealing with legislative programs whose beneficiaries' earned interest is arguably quite strong, the Supreme Court has tended to defer to Congress in recognition that those programs rest "on judgments and preferences as to the proper allocation of the Nation's resources which evolving economic and social conditions will of necessity in some degree modify." *Flemming* v. *Nestor,* 363 U.S. at 610.

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[12] It is noteworthy in this regard that no due process argument has to date been advanced in the suit challenging the change in benefits mandated by the 1980 amendments to Title V. *See* note 7, *supra.*

[13] In *Larionoff* v. *United States,* 431 U.S. 864, 869 (1977), the Supreme Court reaffirmed the established rule that a federal employee's claim to wages "must be determined by reference to [statutes and regulations], rather than to ordinary contract principles." In *Larionoff,* one of the plaintiffs had signed an agreement reenlisting in the military with the expectation that he would receive a statutory reenlistment bonus which was subsequently abolished. While the Court was able to avoid deciding the constitutional issue in this case, it pointed to the "serious constitutional questions" which would have been presented by an attempt to "deprive a service member of pay due for service already performed, but still owing." 431 U.S. at 879. At the same time, it noted that "[n]o one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn." *Id.*

Finally, we come to the theory that Title V was intended by Congress to compensate rail employees for loss of private contract rights, whose benefit structure cannot now be altered without effecting a new "taking." In order to prevail under such a theory, the employees would have to show that they had a valuable property right which was in fact constitutionally "taken" by Congress in 1973. As discussed above, we doubt that such a showing could be made. *Compare United States* v. *Sioux Nation of Indians,* 448 U.S. 371, 407–21 (1980). Assuming, however, that the statements of some legislators on the floor of Congress were in 1973 accepted as a legally accurate characterization of Congress' intent in enacting Title V, the employees would still have to show that the private contract rights they gave up in 1973 were in fact worth what they are now claiming is due them. *See United States* v. *General Motors Corp.,* 323 U.S. 373, 379 (1945). That is, they would have to establish the fair market value of their 1973 rights under the Penn Central Merger agreement and show at a minimum that those rights were greater than the value of the allowances they have already received under the Act. The legal standard applied to test the adequacy of compensation in taking cases is whether the payment was "fair, just, and equitable." *Choctaw Nation* v. *United States,* 119 U.S. 1, 35 (1886). *See also Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59 (1978) (Price-Anderson Act limiting nuclear plant operators' liability provides a "reasonably just substitute" for tort law remedies it replaced).

While the question of value is always one of fact and one for a court rather than the legislature to decide, *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 327 (1893), we think that in this case a court would find persuasive the value Congress itself placed on rail labor's rights in 1973, at least insofar as it believed those rights were constitutionally required to be compensated at that point in time. In this regard, the terms of the statute and its legislative history make clear that the federal financial commitment to Conrail employees was not an open-ended one. Section 509 authorizes the Railroad Retirement Board to reimburse Conrail for payments to employees in an amount "not to exceed the aggregate sum of $250,000,000 . . ." The legislative history makes clear Congress' intent to limit the exposure of the federal treasury to employee claims under the Act to this amount, an amount regarded even by the most enthusiastic supporters of railroad employees in Congress as sufficient to satisfy whatever obligation the taxpayer might have to subsidize the cost of those employees' dislocation. *See, e.g.,* 119 Cong. Rec. 40,716–20 (1973). Senator Hartke, for example, after expressing the view that Congress' failure adequately to compensate rail employees for their willingness to forgo rights under the Penn Central Merger Agreement might result in a suit in the Court of Claims, himself sponsored the amendment which incorporated the

$250 million reimbursement limitation into § 509. *See* 119 Cong. Rec. 40,720 (1973). In doing so, he made clear his intention that this sum should represent the extent of the federal government's responsibility toward rail employees. *See* 119 Cong. Rec. 40,729–32 (1973).[14]

In summary, the legislative restructuring of the northeast rail system accomplished by the Rail Act resulted in no constitutionally compensable "taking" from railroad employees, and did not impair private contract rights in violation of the Due Process Clause. Moreover, railroad employees have no present vested property interest in the benefits specified in Title V whose abrogation or modification would be prohibited under the Fifth Amendment. If Congress in 1973 committed itself to subsidize some portion of the labor costs associated with the restructuring of rail service under Conrail, that commitment has by now been fully satisfied. As long as legislation is not enacted in an irrational or arbitrary manner, and the burdens imposed on rail labor are not objectively "harsh and oppressive," Congress may take what steps it believes are necessary in order to ensure the continued efficient functioning of rail service in the northeast.

III. Whether Congress May Abrogate or Impair the Value of a Contract Between Conrail and Its Employees[15]

The final question you have asked us relates to the claimed existence of present contractual rights to allowances, equivalent to those specified in Title V, but existing independent of the statute, derived from collective bargaining agreements between Conrail and some of its employees.[16] You have asked us to advise you, assuming the existence of such private contractual rights, whether Congress may relieve Conrail of its obligations by statute consistent with the Fifth Amendment.[17]

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[14] Senator Hartke stated that he did not think there was "even the slightest indication that there is a requirement by Congress to reimburse [Conrail] in an amount in excess of $250 million," 119 Cong. Rec. 40718 (1973), and denied that the law would "bind a subsequent Congress to anything." *Id.* at 40,720. The fact that a new authorization in 1980 increased the federal funds potentially available to pay Title V claims has no bearing on Congress' understanding in 1973 that the sum it was then authorizing was sufficient to satisfy any obligation it might have, under the Fifth Amendment or otherwise, to employees of the restructured railroad system. While it is open to rail employees to claim that their property rights under the Penn Central Merger Agreement were undervalued by Congress in 1973, or that they are somehow otherwise constitutionally entitled now to additional compensation, the burden would be upon them to show that what they have received to date is of less value than what they gave up in 1973.

[15] The constitutional permissibility of contract impairment through legislation has been implicated in several other contexts in connection with the general problem of repealing Title V. As previously discussed, the rail unions claim that Title V was enacted in the first place as compensation for a "taking" arising from contract impairment in 1973. And, the ICC General Counsel has characterized Title V itself as a kind of legislative contract between two private parties, Conrail, and its employees. The analysis developed in this section, while specifically addressed to the proposed modification of present rights under Conrail's collective bargaining agreements, is applicable as well to alleged impairments in these other contexts.

[16] For example, Rule 62 of the contract between Conrail and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC) states that "[p]rotected employees will be afforded the benefits as provided in Appendix No. 8 or No. 9, whichever is applicable." These appendices reproduce the terms of Title V.

While we doubt that a court would regard the displacement allowances mandated by Title V as a property interest, *see* note 9 *supra*, the cases indicate that the legislature may interfere with even ripened contractual entitlements or other property rights so long as the results are not "particularly 'harsh and oppressive,'" *Unites States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17 n.13 (1977), quoting *Welsh* v. *Henry*, 305 U.S. 134, 147 (1938),[18] and that federal legislation affecting existing contract rights can be highly burdensome so long as the burden is not imposed irrationally or arbitrarily. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 17–19. In deciding whether legislation is "harsh and oppressive," the courts have focused not only on the party complaining that his contractual rights have been impaired, but also on the governmental interests furthered by the legislation and efficacy with which it furthers those interests. *See, e.g.*, *Welsh* v. *Henry*, 305 U.S. at 146–57; *Louisville & Nashville R.R. Co.* v. *Mottley*, 219 U.S. at 474.

We would add that a legislative measure interfering with contract rights is more likely to be held constitutional if it is "one of a long series" of actions "regulating the many integrated phases of the . . . business" in question. *Veix* v. *Sixth Ward Building and Loan Ass'n*, 310 U.S. 32, 37 (1940). *See Allied Structural Steel* v. *Spannaus*, 438 U.S. 234, 249 (1978). Persons who are frequently and closely regulated know, and can anticipate, that any commitments they may make and any commitments made to them may well be affected by "further legislation upon the same topic." *Veix* v. *Sixth Ward Building and Loan Ass'n*, 310 U.S. at 38. *See also United States Trust Co.* v. *New Jersey*, 431 U.S. at 19 n. 17; *Norman* v. *Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 308 (1935).

Management-labor relations in the railroad industry have been the subject of federal regulation at least since the mid-1930's and closely monitored by the Interstate Commerce Commission for over 40 years. *See* note 3, *supra*. More recently, labor contracts negotiated on railroads subject to the Rail Passenger Service Act of 1970 have been required to be certified by the Secretary of Labor. *See* 45 U.S.C. § 565. And, in the past several years Congress has imposed explicit and detailed labor protective conditions on railroads undergoing reorganization under the bankruptcy laws, or in liquidation. *See* Pub. L. No. 96-101, 93 Stat. 736 (1979) (Milwaukee Railroad Restructuring Act); Pub. L. No. 96-254, 94 Stat. 399 (1980) (Rock Island Railroad Transition and Employee Assistance Act).[19] Rail employees can scarcely claim that a further reordering of their contractual rights vis-a-vis their employer could not have been anticipated.

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[17] We note that under § 453(b) of the Administration's proposed legislation, any railroad acquiring operating rights from Conrail could not be required to assume obligations under any contract between Conrail and its employees. If Congress may release Conrail from its own contractual undertakings, *a fortiori* it may take steps to ensure a similar latitude for railroads succeeding to Conrail's interest by limiting the authority of the ICC.

[18] *United States Trust Co.* and *Welsh* dealt with state efforts to affect obligations created by contracts. Such efforts are restricted not just by the Due Process and Just Compensation Clauses but by the more specific constitutional injunction that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." Art. I. § 10, cl. 1. This specificity suggests, and the Supreme Court has confirmed, that states have less latitude in imparing contract rights than does the federal government. *Compare Allied Structural Steel* v. *Spannaus*, 438 U.S. 234 (1978), with *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, 428 U.S. 1. If legislative repeal of Title V can satisfy the standards applied to state interference with private contract rights, *a fortiori* it meets the constitutional standards governing federal statutes.

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[19] The labor protection provisions of the Rock Island Act, as amended and reenacted by the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1959 (1980), have been declared unconstitutional and enjoined as a taking of the property rights of creditors, in violation of the Just Compensation Clause. *See In re Chicago, R.I. & P.R. Co.*, 645 F.2d 74 (7th Cir. 1980) (en banc), *aff'g mem.*, Civ. No. 75-B-2697 (N.D. Ill., Oct. 15, 1980). This case has been appealed to the Supreme Court, and probable jurisdiction noted. 451 U.S. 936 (1981) (Nos. 80-415 and 80-1239). [NOTE: The Supreme Court's decision in this case found the provisions at issue repugnant to the Bankruptcy Clause of the Constitution, Art. I, § 8, cl. 4, and affirmed the court of appeals without deciding the issues raised by the plaintiffs under the Just Compensation Clause and several other constitutional provisions. *Railway Executives Ass'n v. Gibbons*, 455 U.S. 457, 465 (1982). Ed.]

Congressional Authority to Require the States to Lodge Federal Pre-Trial Detainees

Congress has power to provide for the housing of federal pre-trial detainees, whether by authorizing the construction of federal facilities or arranging with the states to use state facilities; however, it does not follow that Congress could require unwilling states to house federal prisoners, particularly where state reluctance stems from overcrowding in state and local detention facilities.

The Tenth Amendment limits Congress' power to enact legislation which interferes with the traditional way in which local governments have arranged their affairs; moreover, principles of federalism limit Congress' power to require state officers to perform federal functions.

Historically, Congress has been reluctant to require states to house federal prisoners, although it is not clear whether this reluctance has been motivated by a belief that Congress lacked power to do so by political considerations.

A statutory scheme by which Congress would induce, rather than coerce, the states to house federal prisoners through exercise of its spending power is more likely to be held constitutional, although here too there are limits on Congress' power to impose coercive conditions on the states' receipt of federal funds.

May 18, 1981

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

This responds to your request for an opinion whether Congress would have the authority under the Constitution to enact legislation requiring state and local jail authorities to lodge federal pre-trial detainees for a fee to be established either by regulation or agreement. We are concerned that recent decisions of the U.S. Supreme Court make it more likely than not that the courts would hold such legislation to be too intrusive on the states' sovereignty and therefore unconstitutional under the Tenth Amendment. We suggest you consider devising a legislative scheme which would induce, rather than coerce, the states to offer their facilities to house federal pre-trial detainees.

There is no question that Congress has the power under the Constitution to provide for the housing of federal pre-trial detainees—whether by authorizing the construction of dentention facilities or arranging with the states to use their facilities. *Ex parte Karstendick*, 93 U.S. (3 Otto) 396, 400 (1876). Although this power is not expressly enumerated in Article I, § 8 of the Constitution, the exercise of such power is necessary and proper, under Article I, § 8, clause 18, to provide for an orderly federal system of criminal justice contemplated by several other provisions of the Constitution. *See, e.g.*, Art. II, § 3; Art. III, § 2, cl. 3; Fifth Amendment; Sixth Amendment; Eighth Amendment. That power, however, does not necessarily authorize Congress to require unwilling states to provide facilities to house federal pre-trial detainees, because the Supreme Court has recognized that Congress' exercise of its constitutional power is limited by the Tenth Amendment.

The landmark case discussing the Tenth Amendment's limitations on Congress' exercise of its constitutional powers is *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). In *National League of Cities*, the Court addressed the question whether Congress, in exercising its power under the Commerce Clause, could extend coverage of the Fair Labor Standards Act to employees of the states and their political subdivisions, thus requiring the states to adhere to minimum wage and maximum hour requirements previously applicable only to private employers. While recognizing that Congress has the power under the Commerce Clause to impose such restrictions on private employers, the Court held that the Tenth Amendment limits the exercise of otherwise plenary powers of Congress under the Commerce Clause when the exercise of those powers would impermissibly intrude upon traditional state governmental functions:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

Id. at 845.

The Court concluded that, since application of the Fair Labor Standards Act to employees of states and their political subdivisions would "significantly alter or displace the States' abilities to structure employee-employer relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation," *id.* at 851—areas in which the states have traditionally provided services to their citizens—Congress lacked authority to extend the coverage of the Act to such employees. In a concurring opinion, Justice Blackmun, who joined the Court's opinion and whose vote was necessary to form the Court majority, appeared to temper the Court's opinion by reading it to permit federal intrusion on state sovereignty "where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *Id.* at 856. Four Justices dissented from the Court's decision.

In our view, regardless of whether the language of the Court's opinion is taken literally or whether the "balancing approach" as articulated by Justice Blackmun is applied, the proposed legislation for mandatory incarceration of federal pre-trial detainees in local detention facilities would present serious problems under the Tenth Amendment. The opinion focuses on interference with local government policies and traditional state governmental functions and the displacement of local policy decisions. It is clear that the administration of a jail is a traditional state governmental function. *Wentworth* v. *Solem,* 548 F.2d 773 (8th Cir. 1977). *Cf. Johnson* v. *Avery,* 393 U.S. 483, 486 (1969) ("There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene."). *Meachum* v. *Fano,* 427 U.S. 215, 229 (1976) ("The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the states.").

In reaching our conclusion, we recognize that it could be argued that *National League of Cities* is not applicable to the proposal in question here because the proposed legislation, assuming that it would not also direct the states in the administration of their pre-trial detention facilities, would not directly usurp the decisionmaking functions of the states in the administration of their prison facilities. We are not convinced, however, that legislation must directly supplant state decisionmaking to run afoul of the principles of *National League of Cities.* It is clear from the opinion that the Court was concerned primarily with the effect of legislation on "the traditional ways in which the local governments have arranged their affairs." 426 U.S. at 849. If, as noted in your request, this legislation is necessary because state and local governments are refusing to continue contracting to house federal pre-trial detainees because of overcrowding, a requirement that they provide facilities, regardless of the overcrowding of state and local facilities, may force the states, even with some statutory fee provided, to reallocate their facilities or at worst either to detain fewer persons or to construct more detention facilities.[1] The proposed legislation might then be regarded as interfering substantially, though arguably less directly than the legislation invalidated in *National League of Cities,* with the states' administration of their prison facilities.

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[1] The states, with already crowded facilities, would be placed in a particularly difficult position by the proposed legislation because, unless they acted to relieve any overcrowding caused by housing federal pre-trial detainees, they could be found by a federal court to have denied the detainees due process and ordered to eliminate the overcrowding. *See Campbell* v. *Cauthron,* 623 F.2d 503 (8th Cir. 1980). *See also Bell* v. *Wolfish,* 441 U.S. 520 (1979).

Moreover, under Justice Blackmun's balancing test, the intrusion may be less justifiable than the intrusion held to be impermissible in *National League of Cities.* The federal interest served by the proposed legislation appears to be primarily that of saving the cost to the federal government of constructing and administering pre-trial detention facilities for its detainees. In cities where there are relatively few federal detainees, it would obviously be more efficient to use existing state facilities than to construct new federal facilities. That interest, however, does not seem to be "demonstrably greater" than the state interest in avoiding further overcrowding of its facilities so as to justfy the intrusion.

There is also a line of cases decided prior to *National League of Cities* which suggests that this proposal could be considered as far more intrusive than imposing wage and hour restrictions on state governments because it imposes an affirmative obligation on the states and their subdivisions to perform a federal function. In *Prigg* v. *Pennsylvania,* 41 U.S. (16 Pet.) 539, 615–16 (1842), and more clearly in *Kentucky* v. *Dennison,* 65 U.S. (24 How.) 66, 107 (1860), the Supreme Court held that, while Congress may delegate the performance of federal functions to state officers, the principles of federalism deprive Congress of the power to *require* state officers to perform such functions:

> Indeed such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. *And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it;* for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

65 U.S at 107–108 (emphasis added). While the Court has implicitly recognized exceptions to this principle when a specific federal power in the Constitution was clearly intended to intrude upon state sovereignty, *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 456 (1976) (Fourteenth Amendment); *City of Rome* v. *United States,* 446 U.S. 156, 178–80 (1980) (Fifteenth Amendment), the general principle has not been expressly disavowed

by the Court [2] and continues to be regarded by commentators [3] and lower courts as still viable.

In a series of court of appeals decisions criticizing regulations promulgated by the Environmental Protection Agency (EPA) which would have required states to enact statutes and to administer and enforce EPA programs, three circuit courts criticized those regulations as intruding upon state sovereignty in violation of the Tenth Amendment. In *District of Columbia* v. *Train,* 521 F.2d 971 (D.C. Cir. 1975), the court emphasized that the EPA could not, consistent with the Tenth Amendment, "commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles." *Id.* at 992. *See also Brown* v. *EPA,* 521 F.2d 827, 841 (9th Cir. 1975) *citing Dennison* and *Prigg; Maryland* v. *EPA,* 530 F.2d 215 (4th Cir. 1975). The Supreme Court granted certiorari to review these cases but did not render an opinion on the merits because the Government in its brief conceded the need to modify its regulations. *EPA* v. *Brown,* 431 U.S. 99 (1977).[4]

Finally, there is some historical evidence, which is far from conclusive, that the first and subsequent Congresses may have believed that they were not empowered by the Constitution to require unwilling states to house federal detainees.[5] When the federal government was founded, it presumably would have been prohibitively expensive for the new government to provide its own prison facilities to house federal prisoners scattered throughout the original 13 states. Congress dealt with this problem not by *requiring* the states to make their facilities available to the federal government, but by adopting a joint resolution on September 23, 1789, *recommending* "to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners committed under the authority of the United States" and authorizing payment to the states for the use of their jails. 1 Stat. 96–97 (1789). The joint resolution passed both Houses of Congress without any recorded debate.[6] Thus, we do not know whether the decision by the first Congress to recommend to the states that they permit the federal government to use their prison facilities, rather than requiring them to provide the facilities, was motivated by a belief that Congress lacked the power to require the latter or that the former was merely politically more acceptable.

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[2] Recently, the Supreme Court, in discussing the legislative history of 42 U.S.C. § 1983 in *Monell* v. *New York City Dept. of Social Services,* 436 U.S. 658, 676 (1978), suggested in dictum that a line of cases which included *Dennison* and *Prigg* had not survived as precedent. It is not clear what, if any, weight should be given to that dictum, however, because the Court cited *Ex parte Virginia,* 100 U.S. (10 Otto) 339, 347–48 (1879) as support—a case which held *Dennison* inapplicable because the Fourteenth Amendment expressly gave Congress the authority to interfere with and compel action by state officers in matters covered by the Amendment.

[3] *See* Hart, *The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489, 515–17 (1954) ("Taney's statement [in *Dennison*] can stand today, if we except from it certain primary duties of state judges and occasional remedial duties of other state officers. Both exceptions, it will be observed, involve enforcement through the orderly and ameliorating forms of the judicial process. In any event, experience with the exceptions does little to bring into question the principle of the rule.")

[4] Recently, a district court in Mississippi declared unconstitutional provisions in the Public Utility Regulations Policies Act of 1978 (PURPA), Pub. L. No. 95–617, 92 Stat. 3117, which required state regulatory authorities to implement, when appropriate, certain federal standards against utilities. *Federal Energy Regulatory Commission* v. *Mississippi,* No. J. 79–212(c) (S.D. Miss. February 27, 1981). FERC and the Department of Energy filed a joint notice of appeal to the Supreme Court on March 13, 1981. As pointed out in the Jurisdictional Statement filed by the Solicitor General in this case and earlier by an opinion of this Office (Memorandum from Deputy Assistant Attorney General Mary C. Lawton to Assistant Attorney General John H. Shenefield dated November 9, 1978), Titles I and III of PURPA permit the states to choose whether to implement the federal standards and, therefore, do not impermissibly intrude on the states' sovereignty. Title II of PURPA is closer to the proposed legislation because it requires state regulatory authorities to implement rules promulgated by FERC, albeit allowing such authorities considerable discretion in deciding how to implement the rules. The Solicitor General argues in his Jurisdictional Statement that, because discretion is permitted in the implementation of the rules, any intrusion on the states' sovereignty is minimal and, in any event, justified by the paramount federal interest in dealing with the energy crisis. Appellant's Jurisdictional Statement at 21–23, *FERC* v. *Mississippi,* No. 80–1749 (October Term, 1980). Although PURPA is different in several respects from the legislation proposed here, Supreme Court review of PURPA may shed some light on the question of what if any obligations to enforce federal law may be imposed on the states. [NOTE: In *FERC* v. *Mississippi,* 456 U.S. 742 (1982), the Supreme Court held that Titles I and III of PURPA were not unconstitutional on Tenth Amendment grounds, finding that they "simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals." 456 U.S. at 765. Ed.]

Congress' action in 1821, however, when some states apparently refused to permit the federal government to continue to use their prison facilities, lends some support to the inference that the early Congresses believed that they lacked the power to require the states to provide facilities. From a joint resolution adopted by Congress in 1821,[7] it appears that some states, having followed Congress' recommendation in 1789 to permit the use of their prison facilities by the federal government, subsequently decided to withdraw their permission. Congress responded to that withdrawal, not by requiring the states to make their facilities available to the federal government, but by authorizing the marshal, in those states that had withdrawn their permission, to "hire a convenient place to serve as a temporary jail, and to make the necessary provision for the safe keeping of prisoners committed under the authority of the United States, until permanent provision shall be made by law for that purpose." 3 Stat. 646–47 (1821). *See also* 4 Stat. 118 (1825) and 4 Stat. 777 (1835) (authorizing the courts to order execution of prison sentences in state prisons where "the use of which shall be allowed and authorized by the legislature of the state for such purposes."); 13 Stat. 74–75 (1864) (authorizing the Secretary of the Interior to contract with state authorities for the use of prison facilities for persons convicted of federal crimes in the territories); 13 Stat. 500 (1865) (authorizing courts to order execution of prison sentences longer than 1 year in state prisons where use of the prison is authorized by the state legislature). Again, there is nothing in the legislative history to indicate that Congress believed that it lacked power to require the recalcitrant states to make their facilities available to the federal government; Congress may have been merely reluctant to exercise this power. Thus, we cannot conclude on the basis of this history that the Tenth Amendment precludes such a requirement, but we believe it provides some insight into the sensitive manner with which this issue has been treated by Congress since the founding of our government.

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[5] If such a belief were expressed clearly, which it is not, it would be considered a contemporaneous construction of the Constitution, followed since the founding of the government, and entitled to great weight in determining the scope of Congress' power. *Cf. Ex parte Quirin*, 317 U.S. 1, 41–42 (1942); *Williams* v. *United States*, 289 U.S. 553, 573–74 (1933).

[6] 1 Debates in Congress, 86, 938 (Gales & Seaton eds. 1789).

[7] *Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled*, That where any state or states, having complied with the recommendation of Congress, in the resolution of the twenty-third day of September, one thousand seven hundred and eighty-nine, shall have withdrawn, or shall hereafter withdraw, either in whole or in part, the use of their jails for prisoners committed under the authority of the United States, the marshal in such state or states, under the direction of the judge of the district, shall be, and hereby is, authorized and required to hire a convenient place to serve as a temporary jail, and to make the necessary provision for the safe keeping of prisoners committed under the authority of the United States, until permanent provision shall be made by law for that purpose; and the said marshal shall be allowed his reasonable expenses, incurred for the above purposes, to be paid out of the Treasury of the United States. Act of March 3, 1821, 3 Stat. 646–47 (1821).

Therefore, while we cannot be certain that the proposed legislation would be unconstitutional, we believe that it would raise a serious question under the Tenth Amendment whether Congress, on enacting such legislation, had impermissibly intruded upon the states' sovereignty. We suggest that you consider, as an alternative, a statutory scheme which would induce, rather than coerce, the states to cooperate in making their detention facilities available to the federal government. Congress, by invoking its power under the Spending Clause, could condition the availability of some grant program to individual states on the cooperation of the states in providing detention facilities for federal pre-trial detainees. Such legislation should, however, be carefully formulated because the Court has recently reaffirmed its warning that "[t]here are limits on the power of Congress to impose conditions on the States pursuant to its Spending Power." *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 17 n. 13 (1981).[8] However, if the legislation is not coercive and would contemplate that the states would receive benefits reflecting the incremental costs (including costs attributable to administrative and capital costs) of housing the federal detainees in state facilities, the burden and coercive effect on the states should not be considered excessive and such legislation would probably be upheld. I would imagine that there are already federal subsidies to state prison facilities, and it might be feasible to condition receipt of a portion of such subsidies on the willingness to provide facilities (for compensation) for federal pre-trial detainees. If you would like to consider such an approach, we will be happy to assist further with the formulation of such legislation.

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[8] For example, statutory inducements cannot be used as "weapons of coercion, destroying or impairing the autonomy of the states." *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 586 (1937).

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Payment of Moving Expenses as Supplementation of a Government Officer's Salary

Private employer's payment of prospective federal officer's moving expenses does not constitute a supplementation of his federal salary in violation of 18 U.S.C. § 209, where the payment is contractually or routinely paid to departing employees, where the purpose of the payments is other than to compensate federal employment, and where the entitlement and amount of the payment do not favor federal employment.

While neither the prospective officer's continued affiliation with his private employer, nor its payment of his moving expenses, create an immediate or anticipated conflict of interest with his governmental duties, the Justice Department's Standards of Conduct might require that he disqualify himself from any official participation in a matter affecting his private employer's interests.

May 21, 1981

MEMORANDUM OPINION FOR A PROSPECTIVE DEPARTMENT OF JUSTICE OFFICER

You have asked us to advise you concerning the propriety of the proposed payment of your moving expenses by your present employer, University X, in anticipation of your nomination, confirmation, and service as an officer of the Department of Justice. We understand that during your tenure as an officer of the Department you would be on a leave of absence from the University, and that the payment of your moving expenses would be made pursuant to the University's "Professional Development Program." You have provided us with the portions of the University handbook that describe this program, and by letter you have described your school's policy and practice in administering the program. In light of this information, upon which we have relied, we conclude that the proposed payment of moving expenses [1] is acceptable under 18 U.S.C. § 209 and under this Department's Standards of Conduct, 28 C.F.R. Part 45.

As you know, 18 U.S.C. § 209 prohibits a government employee from accepting "any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch." It is our view that the payment of moving expenses may constitute a supplementation of salary within the purview of § 209, if the payment is made "as compensation for" federal employment. *Cf.* § 209(e). On the other hand, if the payment is made for past or future services to a private employer, without regard to the recipient's governmental duties, then it would not be prohibited by § 209. *See, e.g.*, 41 Op. Att'y Gen. 217 (1955). Since it is difficult to ascertain the true motivations behind any given payment, we generally discourage the acceptance of moving expenses from former employers. However, if it can be demonstrated that moving expenses are contractually or routinely paid by the private employer to departing employees, that the purpose of these payments is other than to compensate federal employment, and that the entitlement and amount of payment do not favor federal employment, then we will approve the payments under § 209. In our judgment, the proposed payment by University X meets these standards.

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[1] We assume that the University's payment will not exceed your actual moving expenses and that it will be otherwise reasonable in amount.

The University's Professional Development Program apparently was intended to serve in lieu of a university sabbatical program. It is clear both from the provisions of the plan, and from the traditional function of sabbaticals, that the primary purpose of such programs is to enhance the quality of service that the employee will render to the institution upon return from the leave. In this regard we note that University X's plan requires subsequent service, and provides for the evaluation of leave applications based upon their potential contribution to the goals and stature of the University. The materials you have provided also demonstrate to our satisfaction that University X's plan compensates faculty for moving expenses with some regularity, and that it is not designed or administered to favor federal employment over other forms of professional development leave. Your letter explains that your school's policy has been to pay the moving expenses of faculty on professional development leave whenever those expenses are not paid from another source. In addition, you have advised us in telephone conversations that the vast majority of the University faculty who have taken professional development leave have done so to undertake projects other than federal employment. In light of these representations and our understanding of the purpose of the plan, we conclude that the University's payment of your moving expenses would not be compensation for your federal employment in contravention of § 209.

In addition to the proscriptions of § 209, the Justice Department's Standards of Conduct require that employees avoid financial interests that create a conflict of interest with their governmental duties, 28 C.F.R. § 45.735-4. We are aware of not immediate or anticipated conflicts that would be created by your continued affiliation with University X or by its payment of your moving expenses. However, should any matter affecting the interests of University X come before you in your official capacity, you may be required to disqualify yourself from any official participation in the matter. § 45.735-5. If such a situation arises, we will be available to advise you about it.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Legality Under Anti-Lottery Laws of Amendments to Simultaneous Oil and Gas Leasing Procedures

The amendment of the Simultaneous Oil and Gas (SOG) Leasing Procedures to clarify the discretion of the Secretary of the Interior to decline to award leases to applicants whose names are drawn under the SOG procedures, provides some additional support for the conclusion in the April 7, 1980, OLC memorandum that the SOG program is not a prohibited lottery within the scope of 18 U.S.C. §§ 1302 and 1304.

Serious legal difficulties would arise if the SOG regulations were amended to establish a multiple filing system which would give preference to those willing and able to pay the most for lease opportunities, because of the statutory requirement that oil and gas leases be awarded not to the highest bidder but to the first qualified person making application to hold a lease. Moreover, insofar as a multiple filing system would tax lease applicants by making their chances depend on the size of their payments, and potentially enrich the government, it might be considered a violation of the anti-lottery laws.

In the absence of a specific statutory limitation on the amount which may be charged each applicant for a lease, the Secretary is authorized to increase the present fee to a level that more accurately reflects the actual cost of administering the system.

June 8, 1981

MEMORANDUM OPINION FOR THE DEPUTY SOLICITOR, DEPARTMENT OF THE INTERIOR

You have requested the views of this Office on two legal questions that involve the Simultaneous Oil and Gas (SOG) Leasing Procedures. Both of these questions were prompted in part by a memorandum issued by this Office on April 7, 1980, *Applicability of Anti-Lottery Laws to Simultaneous Oil and Gas Leasing Procedures,* 4 Op. O.L.C. 557 (1980). In that memorandum we expressed the view that the random lease allocation system established by these procedures is not a prohibited "lottery" within the meaning of 18 U.S.C. §§ 1302 and 1304. Those statutes are discussed in detail in that memorandum.

Your first question concerns a recent change in the SOG regulations. Although it has always been the law that the Secretary of the Interior has discretion to decline to award leases to applicants whose names are drawn under the SOG procedures, some portions of the old regulations did not expressly recognize that discretion. *See, e.g.,* 43 C.F.R. § 3112.4–1 (1979) (a lease "will be issued to the first drawee qualified to receive a lease"). The regulations have now been amended to establish an offer and acceptance procedure that is more clearly in harmony with the Secretary's discretionary power.[1] You ask whether this change in the regulation alters our previous conclusion that the SOG program falls within the usual legal definition of a lottery[2] but is not a prohibited lottery within the meaning of §§ 1302 and 1304.

In our previous memorandum we took note of the argument that the Secretary's residual discretion distinguishes the SOG program from some kinds of lotteries. *See* 4 Op. O.L.C. at 561. We concluded, however, that the existence of discretion in the Secretary does not in itself make a decisive legal difference in the interpretation of the criminal statutes. The purpose of the SOG procedures is to "manage the crowd" while implementing the Secretary's responsibility to award leases to the first qualified persons making application. The system operates by allotting things of value (oil and gas leases) among multiple qualified applicants on the basis of chance. That is the effect of the procedures whenever the Secretary, in his discretion, awards a lease to a randomly selected applicant. Whenever that occurs, the SOG procedures so clearly resemble a "lottery" that there would be a substantial question concerning their legality if Congress had intended in the relevant criminal statutes to suppress lotteries of every kind. As you know, we concluded in our previous memorandum that Congress did not intend to suppress certain "lotteries" employed by officers of the United States in the due administration of their statutory powers, if such lotteries are not designed to enrich the "promoters."

The change in the old regulation to reflect more clearly the scope of the Secretary's discretion does not affect our previous analysis or the conclusion articulated in the April 7, 1980, opinion. If anything, the clarification of the regulation with respect to the Secretary's discretion provides a small measure of additional support for our conclusion that the SOG program, in its present form, is a reasonable attempt by the Secretary to carry out a function assigned to him by statute and is not therefore a prohibited lottery within the scope of §§ 1302 and 1304.

Your second question concerns a proposal that has been made for further modification of the SOG procedures. Under the present system, each lease applicant is permitted, for a nominal fee, to file a single application for a given lease; and all qualified applicants have an equal chance of being selected under the random selection process. It has been suggested that this system could be changed to permit applicants to make an unlimited number of applications. The application fee could remain the same ($10 for each application), or it could be raised. In either case, the amended system would permit each applicant to purchase as many chances for a lease as he desired, while requiring him to pay proportionately for that privilege. Thus, if an applicant wished to purchase 1,000 chances, he would pay the Department $10,000, assuming the application fee remained $10; he would pay $10,000 for 500 chances if the fee were increased to $20 per application.

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[1] The new regulations are set out in 45 Fed. Reg. 35,164 (May 1980). In general, they provide that an applicant whose name is drawn under the SOG procedures may execute and tender a lease agreement, together with a year's rent, which the Secretary may then accept or reject in his discretion.

[2] *See FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954).

You note that in our previous memorandum we attributed some significance to the fact that the present SOG "lottery" does not enrich federal coffers and does not encourage "gambling" by permitting applicants to purchase more than one chance for a lease. In light of that position, you ask whether we would take a different view of the "lottery" issue if the SOG regulations were amended to permit multiple filings either at the present $10 fee or at an increased fee. You also ask whether our views would be altered if the present single filing system were retained but the application fee were increased to generate greater revenues for the government. We will address those questions in turn.

1. *Multiple filing.* We have carefully reviewed with appropriate officials within your Department the policy reasons behind your consideration of a multiple filing system. We understand that the SOG program is not entirely satisfactory from a policy standpoint. As presently administered, it is inefficient economically, for it does not allocate leases to the applicants who are most qualified to explore for oil and gas. It has produced a private assignment market in which leases obtained by applicants who have no intention of exploring for oil or gas are sold to bona fide exploration companies for impressive profits. It encourages fraud by creating an economic incentive for violation of the single application rule. The suggestion has been made that these problems could be ameliorated, or perhaps even cured, if applicants were permitted to register the strength of their desires for a given lease by purchasing multiple chances at an aggregate price that would approximate the "true" value of the exploration opportunity represented by the lease.

We do not question the merit of the policy argument, but we think that serious legal difficulties would arise if the SOG program were amended to establish a multiple filing system. We could not recommend that such a change be made without further statutory authorization.

The primary problem is that the change would make it more difficult to argue that the SOG system is an otherwise lawful and reasonable means of carrying forward the underlying statutory mandate—the requirement that the Secretary award these leases, not to the highest bidders, but to the persons "first making application" who are "qualified to hold a lease." *See* 30 U.S.C. § 226(c). The random selection process was sustained in *Thor-Westcliffe Development, Inc.* v. *Udall,* 314 F.2d 257 (D.C. Cir. 1963), as a reasonable means of "managing the crowd" while complying with that mandate; but if the system were changed to authorize multiple filings at prices that would depend on the number of filings made by each applicant, the Secretary would be "managing the crowd" by giving an advantage to those applicants who are willing and able to pay the most for lease opportunities. We think it would be difficult to reconcile that preference with the legislative intention that appears on the face of the leasing statute. Among otherwise qualified applicants,[3] the willingness of one applicant to pay more than the others for a chance at a lease may be some indication of the relative strength of his desire to exploit the exploration opportunity; it may also be nothing more than an indication of his willingness to risk more money to obtain a lease that can be sold on the assignment market. In any case, there is no suggestion in the statute that an applicant's willingness to pay more should entitle him to priority over the other qualified applicants, all of whom seek a place in line.[4] Congress has mandated that the lease should be awarded not to the person who is willing to pay the most, but to the person "first making application." In complying with that mandate the Department has long taken the position that all applicants should be given an "equal chance" for a lease. The single application rule was adopted for that very reason. That interpretation of the statute has been approved by the courts, *see McKay* v. *Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955); and it has been tacitly accepted by Congress, a fact noted in our previous memorandum.

Without further legislation, the question of authorization is made more problematic by the statutory prohibition against "lotteries." We must construe the Acts of Congress harmoniously where such a construction is possible. Implied amendments or repeals are disfavored, and that principle is relevant here. It is one thing to conclude, as the court concluded in *Thor-Westcliffe Development, Inc.* v. *Udall, supra*, that Congress has impliedly authorized the Secretary to pick randomly among a crowd of applicants when he has no more effective means of determining who is "first" while maintaining order in the queue; but it is quite another to conclude that Congress has impliedly authorized a system to multiple filings that would bear not only a formal, but also a substantive resemblance to devices that Congress has condemned in other legislation. Through the criminal statutes Congress has sought to suppress lotteries designed to tax the public and to enrich the "promoters." A multiple filing system would tax lease applicants by making their chances depend on the size of their payments; and it could enrich the government, depending on the actual cost of administrative system and the number of chances purchased by the applicants in a particular case. Since, as we noted in our earlier memorandum, Congress was concerned with the moral issues presented by schemes in which persons are encouraged to risk their resources on the chance of a windfall, we are concerned that a multiple filing system would appear to do precisely that and might therefore be considered a violation of the anti-lottery laws. In general, the more closely the leasing system resembles otherwise prohibited lotteries, the more difficult it becomes to sustain the system under the leasing statute, for the leasing statute cannot authorize an otherwise prohibited lottery without impliedly amending the criminal statutes *pro tanto.*

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[3] The statute suggests that virtually any citizen of the United States is "qualified" to hold a lease, subject to certain statutory ceilings on aggregate lease holdings. *See* 30 U.S.C. §§ 181 and 184. The relevant regulations reflect that interpretation of the statute. *See* 43 C.F.R. § 3102.1 *et seq.*

[4] The legislative history of the leasing statute is consistent with the view that the size of an applicant's payments should not entitle him to priority. The lease system replaced the old system of prospecting permits for land containing no known deposits of oil and gas; yet in replacing the old system, Congress ultimately declined to subject the new prospecting leases to competitive bidding. Congress thereby preserved the central feature of the prospecting system—the preference given to the "first" claimant, whatever his financial resources. *See* Act of August 21, 1935, ch. 599, 49 Stat. 674; *see also* 79 Cong. Rec. S12075 (July 30, 1935) (remarks of Senator Pittman); *see also* Act of August 8, 1946, ch. 916, § 3, 60 Stat. 951; *see also* S. Rep. No. 1392, 79th Cong., 2d Sess. (1946).

2. *Single filing, increased fee.* You have asked whether any legal difficulty would be presented by a simple increase in the $10 filing fee. We understand from conversations with officials in your Department that under the options now being considered, the increase would be justified by the increased cost of administering the SOG procedures.

Congress has declared generally that any "privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value" issued by a federal agency shall be "self-sustaining to the full extent possible"; and to that end Congress has authorized the head of each federal agency to prescribe uniform fees to be charged in connection with the issuance of "things of value." *See* 131 U.S.C. § 483a. In fixing the amount of such a fee, the agency head is entitled to take into account a number of factors, including the direct and indirect cost to the government, the value of the thing to the recipient, and the public policy or interest to be served in charging the fee. *Id.*

We are unaware of any specific statutory limitation that would supersede this general authority in the case of fees charged for SOG applications. In the absence of a specific statutory limitation, we believe the Secretary is authorized by 31 U.S.C. § 483a to increase the present $10 fee to a level that more adequately reflects the actual cost of administering the SOG system, a system which, in its present form, is authorized by the leasing statute. We do not believe that an increase would be held to violate the anti-lottery laws if it is rationally related to the administrative costs by the system and to the purpose of finding qualified applicants, and is not adopted for the purpose of enriching the federal government.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Negotiated Sale of Foreign Gifts to Members of Congress

The General Services Administration is authorized to negotiate the sale of gifts from foreign governments to their original recipients, including Members of Congress, notwithstanding the general prohibition against public contracts with Members of Congress in 18 U.S.C. §§ 431 and 432.

June 8, 1981

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, GENERAL SERVICES ADMINISTRATION

I am responding to your request for this Office's opinion as to the legality of a proposed negotiated sale to Members of Congress of gifts given to those Members by foreign governments. As the terms of the sale are explained in your letter, we conclude that your proposal would not violate 18 U.S.C. §§ 431 or 432.

According to your letter, GSA proposes a two-stage sale of certain gifts that were given to employees of the U.S. government by foreign governments. The first stage is a negotiated sale of the gifts to their original recipients, under 41 C.F.R. 101-49.401 (1980), for a price to be set by independent appraisal. The second stage will be a sale by public advertising of those gifts not purchased by their original recipients through a negotiated sale. It is clear, in general, that the negotiated sale of foreign gifts to their original recipients is expressly authorized by 5 U.S.C. § 7342(e).[1] Your question, however, is whether this authority extends to negotiated sales to Members of Congress given the general prohibitions against public contracts with Members of Congress that appear in 18 U.S.C. §§ 431 and 432.

In relevant part, 18 U.S.C. § 431 prohibits certain public contracts with Members of Congress, as follows:

> Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his

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[1] Section 7342(e) was amended to authorize negotiated sales by § 515 of the Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. No. 95-105, 91 Stat. 862 (1977). That section first appeared only in the Senate version of the Act, but was adopted by the conference committee. Both the Senate committee report and the conference report on the proposed Act specifically refer to the possibility that a negotiated sale might be to the original recipient of the foreign gift. S. Rep. No. 194, 95th Cong., 1st Sess. 30 (1977); H.R. Rep. No. 537, 95th Cong., 1st Sess. 40 (1977).

> account, undertakes, executes, holds, or enjoys, in whole or in part, any contract or agreement, made or entered into on behalf of the United States or any agency thereof, by any officer or person authorized to make contracts on its behalf, shall be fined not more than $3,000.

Section 432 of Title 18 imposes criminal penalties on any officer or employee of the United States who, on behalf of the United States, "directly or indirectly makes or enters into any contract, bargain, or agreement" with any Member of Congress. These prohibitions, in turn, are subject to a number of exceptions specified in 18 U.S.C. § 433. In relevant part, § 433 provides:

> *Sections 431 and 432 of this title shall not extend* to any contract or agreement made or entered into, or accepted by any incorporated company for the general benefit of such corporation; nor *to the purchase or sale of* bills of exchange or other *property where the same are ready for delivery and payment therefor is made at the time of making or entering into the contract or agreement.*

(Emphasis added.)

As your letter points out, the proposed negotiated sales of foreign gifts would fall within the letter of the emphasized language of § 433 because the gifts would be ready for delivery at the time of sale, and payment would be made for the gifts at that time. Thus, reading § 433 on its face, the negotiated sale of foreign gifts to the Members of Congress who originally received them, like the negotiated sale of such gifts to other government employees, would appear to be authorized by 5 U.S.C. § 7342(e) and permitted by 18 U.S.C. § 433. On this basis, your own conclusion is that such sales are legally permitted.

Your evident concern, however, is that, although these sales would fall within the literal terms of § 433, the fact that the proposed sales would be negotiated with Members of Congress prior to public advertising might possibly give rise to the appearance of the kind of potential abuse that gave impetus to the enactment of 18 U.S.C. §§ 431 and 432. It might be argued, for example, that § 433 was intended only to permit sales of government property to Members of Congress when such property is offered on like terms to all members of the public generally, *e.g.*, the sale of postage stamps to all members of the public by U.S. Post Offices. Putting aside the question whether this possibility might ever suggest, as a matter of policy, that negotiated sales with Members of Congress should not be preferred, we agree with you, as explained below, that 18 U.S.C. §§ 431–433 do permit, as a matter of law, the kind of negotiated sales you propose.

Our primary reason for this conclusion is the literal language of 18 U.S.C. § 433. The plain language of a statute is ordinarily the best evidence of what its drafters intended; indeed, in this instance, the recorded legislative deliberations concerning the Act do not shed any light on the Act's meaning or purpose.[2] Furthermore, because the statutes here in question are criminal statutes, it would pose well-recognized problems of fairness, perhaps of constitutional dimension, if a greater scope for the statutes were to be inferrred from considerations not apparent on their face. *Busic* v. *United States,* 446 U.S. 398, 406 (1980); *United States* v. *Bass,* 404 U.S. 336, 347–48 (1971) and cases there cited; *United States* v. *Mandel,* 415 F. supp. 997, 1022 (D. Md. 1976).

Finally, although, under your proposal, the Members of Congress who originally received the gifts in question would enjoy a "right of first refusal" not common to all members of the public, we do not believe, in any event, that your proposal portends the kind of abuse that 18 U.S.C. §§ 431 and 432 contemplate. The evident purpose of these statutes, as interpreted in two early formal opinions of the Attorney General,[3] is to avoid the potential for Members of Congress and employees of the Executive Branch to exert corrupt influence over one another. In this case, the "negotiation" of a sale of foreign gifts would not raise a significantly greater potential for corruption than any other form of sale because no bargaining is to occur between the Members of Congress and GSA. Instead, the price to be paid for each gift is to be determined by an independent appraisal; the price will be the appraised value, plus the cost of the appraisal. 41 C.F.R. § 101–49.401 (1980). This establishes a strong safeguard against improper influence on either side.

On this basis, we conclude that the negotiated sale of foreign gifts to their original recipients who are Members of Congress is authorized by 5 U.S.C. § 7342(e),[4] and that these sales will involve no violations of 41 U.S.C. §§ 431 or 432.

Larry L. Simms
Deputy Assistant Attorney General
Office of Legal Counsel

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[2] The relevant provisions now contained in 18 U.S.C. §§ 431–433 were first enacted in the Act of Apr. 21, 1808, ch. 48, 2 Stat. 484. *See* 17 Annals of Cong. 155–56, 161, 163–64, 171, 178, 330–32, 368–69 (1807–08); 18 Annals of Cong. 1509, 1613, 1618–19, 1719–22, 2080, 2173–75 (1808).

[3] "The object of the statute is only to prevent jobbing between members of the legislature and the Executive, for the pecuniary advantage of the former." 4 Op. Att'y Gen. 47, 48 (1842); "The policy of the law is to prevent the exercise of executive influence over the members of Congress by the means of contracts . . . ." 2 Op. Att'y Gen. 38, 40 (1826).

[4] It is clear from the legislative history of the Foreign Relations Authorization Act, Fiscal Year 1978, that Congress was aware that the new § 7342 would govern the disposition of foreign gifts to Members of Congress. *See* 123 Cong. Rec. 26,532–35 (1977) [House debate on conference report]. We express no views, however, whether, if we viewed the sales you propose as within the purview of 18 U.S.C. §§ 431 and 432, 5 U.S.C. § 7342(e) should be construed as a *pro tanto* implied repeal of those prohibitions.

Constitutionality of Regulations Requiring Prepublication Clearance of Books by Former Iranian Hostages

Under the Supreme Court's holding in *Snepp* v. *United States*, 444 U.S. 507 (1980), the broad prepublication clearance requirements in regulations of the International Communications Agency (ICA) would be held unenforceable through judicial process in a wide variety of applications, notably insofar as they apply to previously disclosed information or to the expression of personal opinions by persons who do not regularly have access to classified information.

The Supreme Court is not likely to uphold a prior restraint on publication by ICA employees in the absence of some powerful showing that substantial and specific harm to the United States would probably result if the publication were permitted. The expression of personal opinion not based on classified information would not satisfy this test.

While the issue is not free from doubt, a strong argument can be made that disciplinary action against an employee based on the need for a foreign policy free from internal dissension in the Foreign Service would not be constitutionally impermissible, particularly if the employee maintained responsibilities at a highly visible level. However, the courts might find discipline involving discharge appropriate only if the statements ultimately made severely and irreparably impaired an individual's ability to perform some services as an employee.

June 11, 1981

MEMORANDUM OPINION FOR THE ACTING DIRECTOR, INTERNATIONAL COMMUNICATIONS AGENCY

This responds to your request for the views of this Office on the constitutionality of certain regulations of the International Communications Agency (ICA) [1] as applied to former Iranian hostages who, as you have informed us, are planning to write books or articles that may be inconsistent with national policy or otherwise injurious to the foreign policy of the United States. For the reasons that follow, we believe that the preclearance requirements of your regulations are probably unenforceable by injunction except to the extent that you seek to prevent publication of classified or sensitive, nonpublic factual information, and are thus able to make a persuasive showing that serious harm to the United States would be likely to result from publication. Despite the breadth of the regulations, however, a lesser showing would be sufficient under the Constitution to justify post-publication discipline such as suspension or discharge if the regulations are violated, but the ICA may not discharge an employee for exercise of First Amendment rights unless it is able to establish that the speech at issue has jeopardized the effective performance of the Foreign Service or of the employee's duties.

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[1] The regulations also apply to employees of the Department of State and the Agency for International Development.

I. Background

Several officers of the ICA were among the American Embassy staff that was seized in Iran on November 4, 1979. Those officers were responsible for carrying out the Agency's duties as press and cultural affairs officials. At least two of the officers[2] have written articles and are currently writing books on the subject. You have informed us that you anticipate that the officers will submit their books or articles to the ICA for clearance in advance of publication. You expect that some of the books may contain comments on current policies of the government that the ICA would prefer not to have published by a Foreign Service officer on active duty.[3] The question presented is whether the ICA may lawfully order deletions or modifications in the text of such books and discipline the officers should they fail to comply with such orders.

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[2] The specific duties of the officers in question are discussed *infra*.

[3] A draft of one of this officer's articles, for example, contains the following statements:

> [The officer's wife stated:] ". . . Terrorism has the American public all worked up. So now terrorism is suddenly a Soviet tool. All the terrorists around the world are being aided and egged on by the Soviets. That's the new theory. The leftists in El Salvador therefore have to be defeated because they, like all terrorists, are the tools of the Soviets. Vested American interests once again con the American public and the U.S. government into protecting and promoting their private interests. Client State El Salvador Incorporated is safe for business and monkey business . . . . What's the matter? You look perplexed."
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> [The officer answered:] "I'm just surprised by the El Salvador thing. I've been cut off from the news. But what you say seems to fit with what I want to say in the book about U.S. foreign policy. Only I thought I'd have to use Cuba, Nicaragua, Taiwan, Korea, the Philippines and of course Iran. [. . .]
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> "We've paid lip service to the ideals set forth in our Constitution, in the Bill of Rights, but our foreign policy has not only been aggressive, it has been selectively aggressive, manipulated by vested interests to promote profits for small groups. It hasn't been in the interests of the general public, of America, especially in recent years . . . . [I want] a foreign policy that is so tough-minded and practical that it can't be manipulated by vested interests, bankers, manufacturers, farmers, import-export firms . . . [or] our own venturesome military . . . .
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> "The American public gets conned into seeing fights in countries like Korea, Vietnam, Iran and now El Salvador as contests between the good guys and the bad guys. [. . .]
>
> "The driving force of U.S. foreign policy has for years been anti-communism, which in itself is probably not in the real interests of the U.S. . . . . We make anti-communism into a religious war. We're emotional and irrational in our opposition to communism. The vested interests are smart enough to play on our obsessive fear. They engineer client states which are profitable to them but most of the profits come from American tax money. The general public pays. South Korea is a great example. They can lobby us with our money. . . . The vested-interest lobbies have an easy time of it. They play on America's obsessive fear of communism and the American need to be loved and admired by foreigners. We like our foreigners fawning and serving. We like client states.
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> "What's wrong with U.S. foreign policy now? It's based on mindless, emotional opposition to communism. . . . We should . . . never back any authoritarian regime anywhere. Not in Iran or Korea or El Salvador."

Under ICA regulations, employees must obtain clearance of all writing of "official concern," broadly defined to include materials "which may reasonably be interpreted as relating to the current responsibilities, programs, or operations of any employee's agency or to current U.S. foreign policies, or which reasonably may be expected to affect the foreign relations of the United States." Uniform State/AID/USIA Regulations, 3 Foreign Affairs Manual 626.2. The purpose of the regulation is "to substitute the agency's institutional judgment for the employee's judgment when the question involved concerns either the release or accuracy of information concerning his agency's responsibilities or what conclusions should be drawn from such information." Clearance will be granted only if "all classified material and all material of official concern . . . which is inaccurate, inconsistent with current foreign policy, or can reasonably be expected to affect adversely U.S. foreign relations, has been deleted . . . ." Matters not on a subject of "official concern" need not be cleared.

II. Discussion

The starting point for analysis of this subject is the decision of the Supreme Court in *Snepp* v. *United States*, 444 U.S. 507 (1980). In that case Snepp, a former employee of the Central Intelligence Agency (CIA), had published a book about certain CIA activities in South Vietnam without submitting the manuscript to the CIA for preclearance. He did so in spite of his written pledge not to divulge without prior authorization any classified material or any information "concerning intelligence or [the] CIA" that had not been made public. The district court and court of appeals found that Snepp's breach of his agreement had irreparably harmed the government. The Supreme Court agreed with the court of appeals that Snepp's agreement was an "entirely appropriate exercise of the CIA Director's statutory mandate to 'protect intelligence sources and methods from unauthorized disclosure.' " *Id.* at 509, n.3 (citation omitted). The Court added:

> [T]his Court's cases make clear that—even in the absence of an express agreement—the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment. The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service. The agreement that Snepp signed is a reasonable means for protecting this vital interest.

Id. (citations omitted). In dissent, Justice Stevens, joined by Justices Brennan and Marshall, acknowledged that the CIA "has a vital interest in protecting certain types of information," but added that "the CIA employee has a countervailing interest in . . . protecting his First Amendment rights." *Id.* at 520. Accordingly, "[t]he public interest lies in a proper accommodation that will preserve the intelligence mission of the Agency while not abridging the free flow of unclassified information." *Id.* In a supporting footnote, Justice Stevens agreed that the government may regulate certain categories of activities by its own employees that would in other contexts be protected by the First Amendment, but suggested that "none of the cases . . . cite[d] involved a requirement that an employee submit all proposed public statements for prerelease censorship or approval. The Court has not previously considered the enforceability of this kind of prior restraint or the remedy that should be imposed in the event of a breach." *Id.* at 520–21, n.10.

After *Snepp,* the ICA regulations at issue raise three separate questions: (1) whether the preclearance requirement itself is enforceable through injunction; (2) whether, if clearance is denied, the ICA may, through judicial process, prevent publication if the employee refuses to comply with the denial; and (3) whether, if clearance is denied, the ICA may discipline or discharge an employee for publishing or disclosing the material in question.

A. Enforceability of preclearance requirement through injunction. You have informed us that the officers in question will voluntarily submit their publications to the ICA for preclearance. As a result, it appears that the officers will not contend that the preclearance requirement is unenforceable through injunction either on its face or as applied. Since, however, the regulations may well come under attack in any litigation on the general subject, we briefly examine the relevant constitutional issues by way of background.

In *Snepp,* the Court upheld the written agreement even though it covered all non-public information bearing on "intelligence" or the "CIA." [4] Moreover, it stated that even in the absence of an express agreement, the CIA could have acted to prevent dissemination of information the disclosure of which would be protected by the First Amendment if it were not carried out by government employees. The Court justified its conclusion on the ground that there was a substantial governmental interest in preserving both the appearance and the reality of confidentiality with respect to non-public information coming into the hands of CIA officials.

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[4] The Secretary of State, in conjunction with the Director, is authorized to promulgate the regulations in question here under the Foreign Service act of 1980, Pub. L. No. 96–465, 94 Stat. 2071. Under that Act, the Secretary of State "may prescribe such regulations as [he] deems appropriate to carry out functions under this [Act]." 22 U.S.C. § 3926 (Supp. IV 1980). In light of the clear necessity for confidentiality by those who represent the United States in the sensitive area of international relations, we believe that a requirement of preclearance is within this broad grant of rulemaking authority.

The regulations at issue here are broader and more stringent than the restrictions contained in the agreement involved in *Snepp*. The regulations here are not limited to particular employees having access to sensitive information. They cover any writings—including those merely expressing personal opinions based on facts in the public domain—that relate to the activities of the employee's agency or to current United States foreign policies. This exceptionally broad prohibition would, we believe, be unenforceable through judicial process in a number of its applications. For example, we are aware of no authority to support the conclusion that the many clerical workers of the Department of State or the ICA could be required to preclear any publications that express views that relate to United States foreign policies, but that contain no information that is either classified or classifiable and that is in the public domain. The reasoning of both *Snepp* and *United States* v. *Marchetti,* 466 F.2d 1309 (4th Cir.), *cert. denied,* 409 U.S. 1063 (1972), suggests that such a requirement would be impermissible.

The *Snepp* case involved the potential for the disclosure of non-public information, the revelation of which could have resulted in irreparable harm to the United States. Any preclearance requirement that is designed to prohibit disclosure of public information or the expression of personal opinion by persons who do not regularly have access to classified or classifiable information, as did Snepp, raises more difficult questions under the First Amendment, for the compelling government interests involved in *Snepp* are largely absent in such circumstances. Such a requirement may be justified, if at all, by the potential harm that may occur if some preclearance mechanism is not applied to the expression of personal opinions, at least by a high-level employee of an agency responsible for the conduct of the foreign relations of the United States.

We are able to identify several such potential harms, falling in four general categories. First, the employee could be rendered less credible as a diplomat if he published writings inconsistent with United States policy. Second, the operation of the Foreign Service could be jeopardized if conflicting views were expressed by different officials, for high-level officials might be unable to dissociate their personal and professional capacities, and foreign countries might thus be uncertain of the actual position of the United States. Third, American foreign policy could be undermined if disputes about that policy among high-level government officials were made public. Finally, the employee's superiors might lose confidence that an employee who has sharply criticized current policy will faithfully represent the United States or accurately state its positions on related and other issues.

In the context of an effort to obtain some form of prior restraint, these types of injury are likely to be considered less damaging to the United States than those created by the disclosure of non-public and sensitive information bearing on national defense and intelligence activities. In essence, the damage consists of the embarrassment caused to the United States by dissent among high-level officials. As we discuss in more detail *infra*, we believe that the courts would allow the Executive to undertake disciplinary action in order to sanction or deter such dissent. There is, however, no authority for the conclusion that the courts would uphold a prior restraint to prevent the expression of personal views when those views do not purport to contain any classified or sensitive information. *Snepp* stands for the proposition that preclearance may be supportable as a means of ensuring against disclosure of classified or sensitive information; it does not justify the use of such a mechanism, enforceable through an injunction issued by a court, in order to suppress the expression of personal opinion.

We thus conclude that the preclearance requirement would be enforced by an injunction only in order to prevent the disclosure of information of the sort involved in *Snepp*. The consequence of this conclusion is that the preclearance requirement is unenforceable through injunction in a wide variety of applications.[5] Whether the number of impermissible applications is so great as to amount to "substantial overbreadth," *see Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), is difficult to assess in the abstract. We believe, however, that the possibility that the preclearance requirement would be held unenforceable by injunction on its face may not be regarded as remote.[6]

B. Restraints in advance of publication. The next question is whether the ICA may lawfully require the former hostages to delete material appearing in proposed writings. We interpret this question to mean whether the ICA may seek a court order imposing prepublication restraints in the event that its employees refuse to comply with the ICA's decision not to clear certain material.

We note, first, that the exceptionally heavy burden ordinarily imposed on the government to justify a prior restraint, *see New York Times Co.* v. *United States*, 403 U.S. 713 (1971), will probably not be applied with full force to a prior restraint imposed by the government on disclosure of information by a government employee. *See Snepp* v. *United States, supra.* The *Snepp* case did not, however, involve total suppression of information, but only preclearance and imposition of a constructive trust after the information had been disclosed. In light of the strong and consistent constitutional hostility to prior restraints, *see Near* v. *Minnesota,* 283 U.S. 697 (1931), we do not believe that the Court would uphold the imposition of a prior restraint on an employee's speech in the absence of some powerful showing that substantial harm would result if the speech were permitted.[7] The only court that has addressed this issue reached a similar conclusion, stating that while the preclearance agreement was itself enforceable, a court should "decline enforcement of the secrecy oath . . . to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights." *United States* v. *Marchetti, supra,* at 1317. According to the *Marchetti* court, even a former agent of the CIA "retains the right to speak and write about the CIA and its operations, and to criticize it as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment which is not already in the public domain." *Id. See also Snepp* v. *United States, supra,* 444 U.S. at 511.

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[5] For this reason, we recommend that the applicability of the preclearance requirement be narrowed to conform to the standards suggested in *Snepp* and this memorandum. The preclearance requirement should be applicable only to employees who have access to and whose writings might contain sensitive or classified information, and to those who are subject to discipline under *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), for statements critical of current policy. With respect to the former, a prior restraint and disciplinary remedies would generally be available in an appropriate case; with respect to the latter, only post-publication remedies would be permissible. *Cf.* n.9, *infra*. If so narrowed, it could be made clear that the purpose of the preclearance requirement is to prevent disclosure of classified or sensitive information, and that disciplinary action would be taken only for such disclosures or for criticism by employees not protected by *Pickering*. Otherwise, the preclearance requirement should be used as a voluntary measure to guard against improprieties.

[6] We do not suggest, however, that the preclearance mechanism may not be used as a voluntary procedure to be used by employees, in order to ensure against improper action on their part and as the basis for disciplinary action against them by their employer. *See infra*.

This analysis suggests that the ICA may enjoin publication by its employees only if there is a probability that substantial harm to the United States would be produced by the disclosure.[8] Mere speculation will probably be insufficient. *See New York Times* v. *United States, supra.* Nor do we believe that a court would enjoin publication solely on the basis of the harm that would be produced by criticism of United States policy by a Foreign Service employee, at least if that criticism is based on or contains only facts within the public domain and facts which are neither classified nor classifiable. The courts have held that the harm produced by the expression of mere opinion is far less constitutionally significant than that produced by disclosure of non-public information of the sort involved in *Marchetti* and *Snepp* and that there are very strong considerations in favor of allowing the broadest possible dissemination of opinion, *cf. Pickering* v. *Board of Education, supra; Gertz* v. *Welch,* 418 U.S. 323 (1974). To support such a prior restraint—as distinct from subsequent punishment—a more substantial threat to United States interests must be shown. *See United States v. Marchetti, supra,* at 1317. The expression of purely personal opinion not based on any closely held information or classified information would not satisfy this test. *Id.* Accordingly, we believe that the ICA may impose a prepublication restraint only in order to prevent or ensure against disclosure of classified or similar information.[9]

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[7] In the *Snepp* case itself, all three courts found that the publication had irreparably harmed the United States.

[8] We note in addition that ICA employees are protected from reprisal for disclosing certain kinds of information. Under the Foreign Service Act of 1980, Pub. L. 96–465, the Secretary of State is required to prescribe regulations to ensure that members of the Service:

> are free from reprisal for—
> (A) a disclosure of information by a member or applicant which the member or applicant reasonably believes evidences—
> (i) a violation of any law, rule, or regulation, or
> (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

22 U.S.C. § 3905(b)(2). We are aware of no statutory provision or executive order that would bar disclosure of the information at issue here. On the other hand, the provisions afford no protection against the pure expression of views, as distinct from the disclosure of information. Furthermore, we are not aware of any information which is threatened to be disclosed in the instant case which is protected by 22 U.S.C. § 3905(b)(2).

C. Discipline. The Supreme Court has indicated that the government may discharge or discipline employees for speech that would be protected by the First Amendment if made by a private citizen. In the leading case of *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), the Court held that a Board of Education could not discharge a teacher for submitting to the local newspaper a letter attacking the school board's handling of certain bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. At the same time, the Court emphasized "that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general," and that "the problem is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer in promoting the efficacy of the public services it performs through its employees." *Id.* at 565.

On the facts of *Pickering,* the Court observed that the teacher's statements were not "directed toward any person with whom appellant would normally be in contact in the course of his daily work as a teacher." Thus no question of maintaining either:

> discipline . . . or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superin-

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[9] It is not certain that an injunction would issue even in such cases. The regulations state that preclearance will be refused for speech simply because it is "inconsistent with current foreign policy." The regulations thus have a number of impermissible applications and might be held substantially overbroad and therefore unenforceable even in a proceeding brought to prevent disclosure of classified information. To prevent this possibility, the regulations should be narrowed in this regard as well, to provide that clearance will not in all cases be denied merely because the statements are inconsistent with United States policy. Clearance should be denied only when (1) sensitive or classified information would be disclosed, and (2)—for purposes of warning that discipline may result, but not seeking a judicially imposed prior restraint when *Pickering* v. *Board of Education, supra,* discussed *infra,* does not protect the relevant employee from such discipline. *Cf.* n.5 *supra.*

If the regulations are overbroad, a court might grant an injunction on the basis of the common law power to enjoin the disclosure of secrets by an employee. *Cf. Snepp* v. *United States, supra.* This is an untested remedy, however, and its availability cannot be assumed with any confidence.

> tendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.

Id. at 570. In a footnote, the Court added that it "is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal." *Id.* at 570 n.3. Finally, the Court noted that since "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication," it would be proper "to regard the teacher as [a] member of the general public." *Id.* at 574.

Following *Pickering,* the courts have examined a number of factors to determine whether a public employee may be discharged for exercising his right to freedom of speech. Those factors include: (1) whether the speech was directed toward a person with whom the employee would ordinarily be in contact during his daily work; (2) whether the speech might threaten harmony among coworkers; (3) whether the speech would damage the professional reputation of its target; (4) whether the speech reflected a difference of opinion on an issue of public concern, or whether it involved an essentially private matter; (5) whether the employment was substantially involved in the subject-matter of the speech, or whether the employee spoke as a member of the general public; (6) whether, because of the high level at which employee operates and because of his decisionmaking authority, restrictions on free expression are necessary; and (7) whether the nature of the particular occupation involved requires special limits on freedom of expression. *Cf. Cooper* v. *Johnson,* 590 F.2d 559, 561 (4th Cir. 1979).

In the context of proposed publications by former hostages, some of these factors point toward the same conclusion reached by the Court in *Pickering.* The proposed publications will apparently relate to issues of public concern. Moreover, the disclosures will presumably not be directed toward a person with whom the employees have daily contact. As a result, there would appear to be little danger that the speech will reflect adversely on a person under whom the employees must work in a direct ongoing relationship. Further, the employees will presumably be criticizing decisions that are made by officials operating at a considerably higher level. Finally, it appears that the former hostages would be expressing their views as members of the public, and not as officials of the United States. This latter factor would not clearly support a First Amendment claim, however, for, simply by virtue of their positions, the continuing employment of the former hostages might be "substantially involved" in the expression of views. Moreover, their views are presumably noteworthy (and marketable) only because of their employment-related experience. Further, these employees are in the Foreign Service. Presumably, any statement by a foreign policy official highly critical of the United States and its foreign policy may be very damaging to the United States and its efforts to promote its foreign policy. Therefore, the nature of their occupation makes their statements more newsworthy, embarrassing, and damaging to their employer.

Although the issue is not entirely free from doubt, we believe that a strong argument can be made that, as a general rule, disciplinary action based on the need for a foreign policy free from internal dissension within the Foreign Service would not be constitutionally impermissible. There is a clear necessity for a consistent position on issues of policy by all those representing the United States at a high level in the sensitive area of international relations. Both the appearance and the reality of consistency are critical in the area of foreign relations, and any criticism of United States policy by an officer in a high-level position in the Foreign Service threatens that goal. As indicated above, the result of such criticism could be to render the employee less credible as a diplomat, to harm the functioning of the Foreign Service by sending conflicting signals from different Foreign Service officials, and to impair the foreign relations of the United States by revealing disputes among high-level officials.

The strength of this argument will vary according to the level and nature of the duties of the particular officer. Plainly, the First Amendment rights of a Cabinet-level employee do not immunize him from discharge by the President for the expression of views that are contrary to those of the Administration. By contrast, an employee performing clerical or other nonpolicymaking functions would generally be entitled to greater constitutional protection against discharge for expressing personal views on matters of foreign relations. The more highly placed the official, the more destructive the statement; the lower the official, the more the statements appear to be personal views. *Cf. Branti* v. *Finkel,* 445 U.S. 507 (1980) (government may not discharge nonpolicymaking assistant public defender because of political party to which he belongs); *Elrod* v. *Burns,* 427 U.S. 347 (1976) (same with respect to employees of county sheriff).

One of the officials under consideration here is a Foreign Service Information Officer who acted as the Public Affairs Officer at the United States Embassy in Iran.[10] In the course of his diplomatic duties,

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[10] His position description includes the following:

> Is responsible for the over-all administration of a total USIS country program and for the maintenance of effective working relationships with the Diplomatic Mission and other United States government agencies. This involves the planning, conduct and continuing evaluation of a coordinated program of information and cultural activities designed to reach selected audience groups throughout the country for the purpose of (a) explaining and interpreting United States objectives and policies and winning support therefor by identifying the country's legitimate aspirations with those of the United States; (b) projecting those aspects of American life and culture which will promote an understanding of our country, our people, our way of life and what we stand for; and (c) countering false and hostile anti-United States propaganda. . . . In

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he performed functions as spokesman for the Embassy in matters involving all aspects of diplomacy, explaining and interpreting United States objectives, winning support for United States policies, and countering false propaganda. He represented the United States in communications with the Iranian press, Ministry of Foreign Affairs, and Ministry of Education. His immediate superior was the Deputy Chief of Mission, who operates directly under the Ambassador. Among his functions was the preparation of a country-wide plan on an annual basis for approval by the Department of State.

The second official is a Foreign Service Reserve officer.[11] In Iran he worked under the first official as a subordinate press official. His responsibilities included communications with the press and the Iranian Ministry of Foreign Affairs on a wide range of subjects, including statements of United States policy. Although his contacts with the Iranian government and press were less frequent and on a lower level than those of the first official, such contacts were an ordinary part of his responsibilities at the Embassy.

We cannot, of course, express a definitive view as to the extent to which these individuals could be disciplined for expressing views critical of the United States without knowing facts and circumstances which we do not have at our disposal. It is, however, apparent that

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> accordance with United States policy and in consultation with the other members of the Country Team, develops the Country Plan which translates the Agency's global mission into definite objectives appropriate to political, psychological, economic and cultural conditions in the country, and which outlines a USIS program of action leading to the achievement of these objectives . . . Insures the fulfillment of USIS responsibilities for (a) the conduct of the educational and cultural exchange programs administered for the Department of State; (b) participation in such other United States government and private exchange programs as are conducted in the country; (c) assisting private local organizations in a position to contribute to the achievement of USIS objectives, such as Bi-National Centers, United States Chambers of Commerce, United States-host country societies; and (d) publicizing in accordance with Mission policy the Agency for International Development program. . . . Advises and assists on Mission press and public relations, including the preparation of official announcements, statements and public addresses. . . . Provides for establishing and maintaining effective working relationships with (a) appropriate officials in the national government; (b) leaders in the mass media, educational , industrial, labor, professional and technical fields; (c) appropriate representatives of Diplomatic Missions of friendly foreign countries; and (d) representatives of other United States government agencies. . . . Represents USIS and, as required, represents the Ambassador at important information, cultural or other functions, and in meeting and assisting distinguished visitors from the United States and other countries.

[11] His position description includes the following:

> Officer directs a Branch of the Program Division which has one other American Officer (Publications Officer) and 30 other staff members. . . . As Chief of one of four branches of the Program Division, Officer is responsible for the application of all post media capabilities to the support of post programs. . . . [C]arries out publicity activities on behalf of the Iran America Society as coordinated by the Chief, Program Division. Officer is responsible for all other post print and broadcast medial placement activities. [O]btains, prepares, publishes and distributes a variety of materials supportive of speakers, panels, seminars, exhibits and other programs designed to achieve post objectives. . . . The Branch is responsible for all press and broadcast publicity in support under the supervision of the Country Public Affairs Officer. In order to accomplish this responsibility, officer is expected to have working knowledge of Iranian media and to establish solid contacts with media professionals.

these individuals maintained responsibilities at highly visible levels. Statements highly critical of United States foreign policy could be severely damaging to that foreign policy and to the ability of these individuals to represent the United States in any similar capacities. Because of the high level of their employment, we believe that the ICA could refuse to return these employees to their prior capacities and could impose disciplinary sanctions to guard against the publication in the future of statements which are highly critical of and damaging to United States foreign policy.

Of course, discharge is the most severe form of discipline.[12] If the statements ultimately made do not severely and irreparably impair the abilities of these individuals to perform some services as employees, the courts might find that discipline short of termination is more appropriate. Since this is largely a subjective decision based upon the proven facts as to the employee's conduct and its compatibility with past and future service, it will serve no purpose to speculate further as to the permissible discipline under a variety of potential circumstances. We do believe, however, that discharge may well be permissible if the employee in question cannot be retained in his present position without maintaining a high-visibility or policymaking rule.

III. Conclusion

For the reasons stated above, we conclude that the preclearance requirements of the ICA regulations would probably not serve to support injunctive relief against the disclosure of personal opinions and previously disclosed facts. Injunctive relief could be obtained, if at all, only on the basis of a persuasive showing that serious and specific harm to the United States would result if disclosure were permitted. Thus, injunctive relief might be available to guard against potential disclosure of classified or closely held information.

Finally, we believe that, if the relevant employees make policy or otherwise perform significant functions as representatives of the United States, they may be disciplined for disclosing information that is not in the public domain, or for expressing views that are plainly inconsistent with the foreign policy of the United States.[13] Whether they can be discharged depends on the specific nature of the duties that they are currently performing and the extent to which the public statements may affect their ability to perform those duties.

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[12] By statute, members of the Service may be separated from the Service "for such cause as will promote the efficiency of the Service." 22 U.S.C. § 4010. This provision, which affords a right to a hearing, is designed to "continue[ ] the Secretary's authority . . . to separate any member of the Service for cause." *See* S. Rep. No. 913, 96th Cong., 2d Sess. 55 (1980). We note that the "efficiency of the Service" standard has been upheld against an overbreadth challenge on the ground that Congress did not intend to allow discharge for speech protected by the Constitution. *See Arnett* v. *Kennedy*, 416 U.S. 134 (1974). We believe that the ICA regulations, to the extent that enforcement is taken through disciplinary action, would probably be similarly treated, and thus narrowly construed so as not to violate the First Amendment. To avoid a contrary judicial conclusion, however, the regulations should be narrowed. *See* nn. 5 & 9, *supra*.

[13] Of course, we express no views on the policy implications of undertaking disciplinary action against a former hostage.

THEODORE B. OLSON
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Office of Legal Counsel

Determination of Wage Rates Under the Davis-Bacon and Service Contract Acts

The Secretary of Labor is required to determine "prevailing" wage rates under the Davis-Bacon and Service Contract Acts with reference to an objective standard of predominance or currency in a given locality. It is proper to define the prevailing rate in terms of the lowest rate only where the lowest rate is also that which occurs with the greatest frequency. Where no single wage rate is predominant, it would ordinarily be permissible for the Secretary to use an average.

The minimum wage rate required by law to be included in all contracts subject to the Davis-Bacon and Service Contract Acts must be at least the prevailing rate as determined by the Secretary of Labor.

In the absence of a statutory definition of a term, one must look to the common understanding of the word, and to the legislative history and purpose of the statute generally. In addition, a presumption of correctness may be accorded the longstanding administrative interpretation of a term.

June 12, 1981

MEMORANDUM OPINION FOR THE COUNSEL TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

This responds to your request for our opinion on several questions relating to the determination of wage rates under the Davis-Bacon and Service Contract Acts. Your first two questions implicate the standards to be used by the Secretary of Labor in determining the "prevailing" wage under the two Acts. Specifically, you ask: (1) whether the Secretary may define the prevailing wage under either Act in terms of the *average* rate paid a particular class of employees in the relevant locality; and (2) whether the Secretary may define the prevailing wage in terms of "a bona fide minimum wage rate," by which we understand you to mean the *lowest* wage paid a class of employees in the relevant locality. Your remaining questions are premised on the notion that the minimum contractual wage rate required by the two Acts may be something less than the "prevailing" rate as determined by the Secretary. If it may not, then the further refinements you suggest are moot.

With respect to the first two questions, we conclude that the law requires the Secretary to determine the "prevailing" wage with reference to an objective standard of predominance or currency in a given locality. It would therefore be permissible for him to define the "prevailing" wage in terms of the lowest rate only where that rate in fact reflects the wage which occurs most frequently—in short, where it is the prevalent wage paid. Where no single wage is predominant, it would ordinarily be permissible for the Secretary to use an average. With respect to your remaining questions, we believe that the minimum wage rate required by law to be included in all contracts subject to the two Acts must be at least the prevailing rate as determined by the Secretary.[1]

I. Determination of Prevailing Wage Under the Davis-Bacon and Service Contract Acts

The Davis-Bacon Act, 40 U.S.C. § 276a, requires that

> [Every covered contract] shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics . . . .

The Service Contract Act provides that covered contracts shall specify the minimum wages to be paid various classes of employees "as determined by the Secretary . . . in accordance with prevailing rates for such employees in the locality . . . ." 41 U.S.C. § 351(a)(1). Neither statute contains a definition of the term "prevailing," and neither specifies the procedure by which the prevailing wage rate should be determined by the Secretary. We must therefore look to the common meaning of the word, and to the legislative history and purpose of the two Acts. 2A Sands, Sutherland Statutory Construction § 47.28 (4th ed. 1973).

Webster's Third New International Dictionary (1976) defines the term "prevailing" as "most frequent" or "generally current," descriptive of "what is in general or wide circulation or use . . . ." Unless there is indication to the contrary in the legislative history, we assume that Congress believed it was codifying this common understanding of the term. *See Addison* v. *Holly Hill Co.,* 322 U.S. 607, 618 (1944) ("legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him").

There is no suggestion in the legislative history of either the Davis-Bacon or the Service Contract Acts that Congress believed it was establishing a wage standard other than one based on frequency or currency. Indeed, testimony at the hearings leading up to the 1935 amendments to the Davis-Bacon Act, which first made provision for predetermination of the prevailing wage rates by the Secretary of Labor, indicates a common understanding by spokesmen for labor and management, as well as individual legislators, that the "prevailing" wage was the wage paid to the largest number of workers in the relevant classification and locality. *See, e.g., Regulation of Wages Paid to Employees by Contractors Awarded Government Building Contracts: Hearings on H.R. 12, 122, 7005, 7254 and H.J. Res. 38 before the House Committee on Labor,* 72d Cong., 1st Sess. 8, 103, 149–50, 186 (1932). *See also* Report of the General Subcommittee on Labor of the Committee on Education and Labor, *Administration of the Davis-Bacon Act,* 88th Cong., 1st Sess. 7–8 (Comm. Print 1963). The legislative history of the 1965 Service Contract Act reflects an assumption that the term "prevailing" as used in that Act would be construed and applied in this same fashion. *See* H.R. Rep. No. 948, 89th Cong., 1st Sess. 2–3 (1965); S. Rep. No. 798, 89th Cong. 1st Sess. 3–4 (1965).

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[1] We should note that we have had an opportunity to review the memorandum prepared by the Solicitor of Labor, which deals with these same questions. While we ordinarily, in matters of statutory interpretation, accord substantial weight to the views of the agency charged with administering the statute, our opinion is based on an independent assessment of the terms of the statutes at issue, their intended purpose, and their legislative history. That our conclusions are essentially the same as those of the Solicitor of Labor confirms our confidence in them.

The definition of "prevailing" wage as the wage most widely paid is consistent with the general purpose of the two statutes, which is to prevent the exploitation of imported labor and the concomitant depression of local wage rates. *See* H.R. Rep. No. 2453, 71st Cong. 3d Sess. 2 (1931); H.R. Rep. No. 948, 89th Cong. 1st Sess. 2 (1965). *See also Administration of the Davis-Bacon Act, supra,* at 2 ("the Davis-Bacon Act was designed to ensure that Government construction and federally assisted construction would not be conducted at the expense of depressing local wage standards.") While it would not be inconsistent with this purpose to set the prevailing rate at a *higher* level than that most widely paid, it was precisely to prohibit payment of a *lower* level of wages than that prevalent in the community that the statutes were enacted.

Finally, the common understanding of the term "prevailing" as "most current" or "predominant" has been incorporated in the Labor Department's administrative regulations since 1935, regulations which have over the years been discussed at length in oversight hearings and in connection with other proposed amendments to the law. *See, e.g., Administration of the Davis-Bacon Act, supra,* at 7–8. There is, therefore, some reason to regard Congress' acquiescence in this interpretation as "presumptive evidence of its correctness." 2A Sutherland Statutory Construction, *supra,* at § 49.10.

We come then to the specific questions whether the Secretary may define the prevailing wage in terms of the average rate or the lowest rate paid in a given locality. As the above discussion indicates, the answers depend upon whether either rate can be fairly said to reflect the rate most widely paid in the relevant locality. In this regard, there appears to us to be no conceptual problem presented where the most widely paid wage is also the lowest.[2] The use of an average, however, may be more difficult to justify, particularly in cases where it concides with *none* of the actual wage rates being paid. As noted in the 1963 oversight hearings, in such a situation "[u]se of an average rate would be artificial in that it would not reflect the actual wages being paid in a local community," and "such a method would be disruptive of local wage standards if it were utilized with any great frequency." *Administration of the Davis-Bacon Act, supra,* at 8. The fact remains, however, that if no single wage can fairly be said to be "prevailing," and no single rate "most current," an average may represent the closest approximation of the statute's requirement.[3]

In sum, we believe that it is proper under both Acts to define the prevailing wage rate in terms of the lowest rate only where the lowest rate is also that which occurs with greatest frequency. Use of an average is permissible in situations in which no single rate can fairly be said to be "generally current."

II. Relationship Between Contractual Minimum Wage and Prevailing Rate

The assumption underlying your remaining questions is that the minimum wage rate required to be contained in every contract covered by the Davis-Bacon and Service Contract Acts may be lower than the prevailing rate as determined by the Secretary. While the terms of both Acts are somewhat ambiguous on this point (contract rates are to be "based upon" or set "in accordance with" the prevailing rate), a review of their legislative histories indicates a clear congressional intent to require the payment of at least the prevailing wage in all covered contracts. *See Watt* v. *Alaska,* 451 U.S. 259, 265 (1981); *Train* v. *Colorado Public Interest Research Group,* 426 U.S. 1, 10 (1976).

As originally enacted in 1931, the Davis-Bacon Act required that the wage rates on every covered contract "be not less than the prevailing rate of wages for work of a similar nature." 46 Stat. 1494. No procedure was established for determining the prevailing rate in advance, however, and the Secretary of Labor's statutory role was confined to resolving after-the-fact disputes. Almost immediately, efforts to amend the Act focused on establishing a procedure by which the prevailing rate could be predetermined and incorporated into the terms of every covered contract. In 1932 Congress passed a bill providing that every contract should contain "a provision stating the prevailing rate of wages as determined by the Secretary of Labor." 75 Cong. Rec. 8365 (1932). *See* S. Rep. No. 509, 72d Cong. 1st Sess. (1932). While the 1932 bill was vetoed by the President, efforts to improve administration of the Act bore fruit in 1935.

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[2] It is theoretically possible under the Department of Labor's present regulations that the lowest paid 30 percent of the workforce would establish the "prevailing" standard applicable to the entire relevant community.

[3] The Labor Department has, since 1935, identified situations in which it is proper to use an average as those in which no single wage rate is paid 30 percent or more employees in the relevant class. *See* 29 C.F.R. § 1.2(a). It now proposes to shift the threshold upwards to permit the use of an average where anything less than a simple majority of employees is earning a single wage. As a general matter, we cannot say that such an approach is necessarily impermissible under either of the two statutes in question. Use of an average might be vulnerable, however, if there is a wide variation in rates of wages and a large minority of persons paid significantly lower wages; use of an average in such a case might result in a contract wage well below the actual wages paid a majority of employees.

The language of the 1935 Davis-Bacon Act amendments differed from that contained in the 1932 bill, but the legislative purpose was unmistakably the same: "[t]o provide that laborers and mechanics . . . are guaranteed payment of local prevailing wages," and "[t]o provide for a predetermination of the prevailing wage on contracts so that the contractor may know definitely in advance of submitting his bid what his approximate labor costs will be." H.R. Rep. No. 1756, 74th Cong., 1st Sess. 2 (1936). The House report goes on to state that

> Provision is made for predetermination of the minimum wage rates by the Secretary of Labor. This provision would strengthen the present law considerably, since at present the Secretary of Labor is not permitted to fix the minimum wage rates until a dispute has arisen in the course of construction.

Id. See also S. Rep. No. 1155, 74th Cong., 1st Sess. 2-3 (1935). There can be little doubt from this and other similar language in the committee reports and in floor debate that the purpose of the 1935 amendments was to provide a more effective mechanism for the enforcement of the prevailing wage rate requirement in the 1931 Act, not to relax that requirement. Congress plainly intended that the Secretary's authority to predetermine the prevailing wage should include the authority to "fix the minimum wage rates" in covered contracts. While the legislative history of the 1935 amendments contains no discussion of the change in language from 1932 to 1935 whereby covered contracts were required to contain wage rates "based on" the prevailing rate rather than simply the prevailing rate itself, the most reasonable explanation is that Congress did not wish to limit contractors who were agreeable to paying something *higher* than the prevailing rate. The one thing which is certain is that Congress did not, by using this phrase, intend to permit contracts specifying *less* than the prevailing rate.

While the terms of the Service Contract Act are similarly ambiguous with respect to the relationship between the contract minimum and the prevailing rate, its legislative history is similary clear. For example, the House report states that "[s]ervice employees must be paid no less than the rate determined by the Secretary of Labor to be prevailing in the locality." H.R. Rep. No. 948, 89th Cong., 1st Sess. 3 (1965). *See also* S. Rep. No. 798, 89th Cong., 1st Sess. 2 (1965).

We conclude, therefore, that there is no support in the law for an argument that employees on contracts covered by either the Davis-

Bacon Act or the Service Contract Act may be paid less than the prevailing rate as determined by the Secretary of Labor.

LARRY L. SIMMS
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Office of Legal Counsel

Anti-Lobbying Restrictions Applicable to Community Services Administration Grantees

The anti-lobbying rider in the Community Services Administration (CSA) appropriation act is broader than the generally applicable restrictions on lobbying by executive officers, and prohibits recipients of CSA grant funds from engaging in any activity designed to influence legislation pending before Congress, including direct contacts with Congress.

Congress is under no obligation to make funds available to any agency for every authorized activity in any given fiscal year, and there should be no presumption that it has done so.

The anti-lobbying statute, 18 U.S.C. § 1913, and the general "publicity and propaganda" rider in the General Government Appropriations Act, have been narrowly construed to prohibit the use of federal funds for "grassroots" lobbying, but not to prohibit a wide range of necessary communications between the Executive on the one hand, and Congress and the general public on the other. The considerations that underlie this narrow construction are irrelevant to a prohibition against lobbying by private persons receiving federal grants and contracts.

Statements made by individual legislators and committees after the enactment of legislation carry little weight in statutory interpretation, and are not a sufficient basis for altering a conclusion required by the plain meaning of the statutory language.

June 17, 1981

MEMORANDUM OPINION FOR THE COUNSEL TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

On January 19, 1981, the Director of the Community Services Administration (CSA) published in the Federal Register an interpretive ruling by the CSA General Counsel discussing the legal effect of an "anti-lobbying" rider that applies to CSA appropriations. *See* 46 Fed. Reg. 4919. The history and language of the rider are set out in the margin.[1] In his ruling, the CSA General Counsel concluded that the

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[1] The rider derives from a provision that first appeared in the FY 1979 appropriation for the Departments of Labor, Health, Education and Welfare, and related agencies. *See* Pub. L. No. 95-480, § 407, 92 Stat. 1589 (1978). The provision has since been carried forward in successive public laws and resolutions applicable to those agencies. *See, e.g.*, Pub. L. No. 96-536 [H.J. Res. 644], 94 Stat. 3166 (1980), *as amended by* Act of June 5, 1981 [H.R. 3512], Pub. L. No. 97-12, 95 Stat. 14, *See* 127 Cong. Rec. S5796-S5807 (daily ed. June 4, 1981). The language of the rider is as follows:

> No part of any appropriation contained in this Act shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself. No part of any appropriation contained in this Act shall be used to pay the salary or expenses of

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rider, in its application to CSA *grantees*, imposes anti-lobbying restrictions that are no more stringent than those imposed upon executive officers and employees by 18 U.S.C. § 1913[2] and by the traditional "publicity and propaganda" rider contained in the Treasury, Postal Service, and General Government Appropriations Act.[3] In reliance upon that legal conclusion, the Director of CSA "waived" certain anti-lobbying restrictions contained in existing CSA grants. Those restrictions were apparently based upon an older, more stringent interpretation of the rider. You have asked whether, in the opinion of this Office, the conclusions reached by the General Counsel were legally correct.

I.

The CSA rider imposes two different kinds of restrictions on the use of appropriated funds. The first, set forth in the first sentence of the rider, prohibits the use of funds "for publicity and propaganda purposes" or for the preparation or use of any "kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before Congress, except in presentation to the Congress itself." This language is similar to the language of the traditional "publicity and propaganda" rider contained in the General Appropriations Act. Unlike the traditional rider, however, the CSA rider catalogs the kinds of materials and "presentations" for which appropriated funds may not be expended (kits, pamphlets, etc.), and it authorizes at least two kinds of expenditures. It expressly permits expenditures for the maintenance of "normal and recognized executive-

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> any grant or contract recipient or agent acting for such recipient to engage in any activity designed to influence legislation or appropriations pending before the Congress.

In its present form, the rider applies by its terms to all appropriations made or continued by the relevant Act, including appropriations for the Departments of Labor, Health and Human Services, Education, and the Community Services Administration, among others.

[2] Section 1913 provides as follows:

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.
>
> Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined not more than $500 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment.

[3] *See* Pub. L. No. 96–74, § 607, 93 Stat. 575. The language of the traditional rider is as follows:

> No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress.

legislative relationships," and it seems to contemplate that funds may be expended for the preparation of kits, pamphlets, and other "presentations" that are made directly to Congress itself.

The second restriction is set out in the second sentence of the rider. Unlike the first, it applies only to persons who receive appropriated funds under government grants or contracts. The second sentence states flatly that "[n]o part of any appropriation contained in this Act shall be used to pay the salary or expenses of any grant or contract recipient or agent acting for such recipient to engage in any activity designed to influence legislation or appropriations pending before Congress." Because this language forbids the payment of expenses for "any activity" designed to influence legislation pending before Congress, it is far broader than the language of the traditional "publicity and propaganda" rider. Moreover, because it applies expressly to grantees and contractors and makes no express provision for direct contacts with Congress, it is quite unlike the language of the "anti-lobbying" statute, 18 U.S.C. § 1913.

In his interpretive ruling, the General Counsel concluded that the two sentences of the CSA rider should be read together. His opinion states that the two sentences impose a single restriction upon the use of federal funds, a restriction that applies equally to federal agencies and federal grantees. He concluded that for agencies and grantees alike, the rider prohibits "grassroots lobbying" and nothing more.

We agree with the General Counsel's conclusion regarding the application of the rider to federal agencies; but for the reasons given below, we cannot agree with his conclusion regarding the application of the rider to federal grantees.

II.

In our view, the language of the second sentence of the rider imposes an unqualified prohibition against payment of expenses incurred by grantees in any activity designed to influence legislation pending before Congress. The meaning of the language is quite clear when the second sentence is considered alone. The meaning is made even clearer when the second sentence is read in context with the first. The first sentence makes provision for normal and appropriate "relationships" between the Legislative and Executive Branches of government; it is conspicuously silent with regard to federally financed "relationships" between Congress and federal grantees. The first sentence prohibits federal agencies from expending appropriated funds only for "publicity and propaganda" or for the preparation of certain kits, pamphlets, and presentations. The second sentence forbids grantees and contractors to expend appropriated funds for *any* activity designed to influence pending litigation.

We believe, in short, that these two sentences impose two different anti-lobbying restrictions: one, a traditional "publicity and propaganda" restriction applicable to officers and employees of the government; the other, an unqualified prohibition against lobbying by federal grantees. The meaning of the rider is so plain on the face of the text that we could not accept another interpretation unless there were persuasive reasons for doing so.

The General Counsel gave three reasons for interpreting the rider narrowly in its application to CSA grantees. He argued, first, that if the rider were read broadly, it would prevent CSA grantees from carrying out their contractual obligation to be advocates for the poor. He also noted that CSA itself is required by statute to "stimulate a better focusing of federal resources on behalf of the poor," and he argued that the rider should not be read to frustrate that statutory mission. Second, he argued that 18 U.S.C. § 1913 and the General Appropriations rider have been construed narrowly and that the CSA rider should be given a similar interpretation so that the mission of CSA and the CSA grantees will not be frustrated. Finally, he noted that Senator Warren Magnuson, Chairman of the Senate Labor, Health and Human Services and Education's Appropriation Subcommittee, stated in a letter to the Director of CSA that his subcommittee did not intend the rider to prevent CSA and its grantees from: (1) responding to any request for information from Members of Congress; (2) providing educational information to Congress and the public in general on the effects of legislative issues on individuals and/or communities; and (3) providing information to Congress concerning legislative issues which directly affect the continued existence of CSA or its grantees.

In our opinion, the reasons given in support of the General Counsel's interpretation neither require nor justify a narrow reading of the statutory prohibition against lobbying by grantees. Our research has not uncovered any other consideration that would require us to alter our initial conclusion that the rider means what it says. We will discuss the relevant points below.

Contractual and statutory obligations. The General Counsel suggested that a strict reading of the rider would prevent grantees from discharging their obligations under their grants. But federal grantees cannot be required to do what federal law prohibits. Even if we could accept the contention that existing grant provisions require CSA grantees to use appropriated funds to lobby for or against specific legislation pending before Congress,[4] the existence of that "requirement" would not be a valid reason for interpreting the appropriations rider either narrowly or broadly.

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[4] In fact, existing CSA grants contain express anti-lobbying provisions, which were "waived" in the January 19, 1981, publication. In light of those provisions, we simply do not understand the argument that the contractual obligations of CSA grantees collided with the appropriations rider.

Regarding the related but somewhat different contention that the organic legislation governing CSA conflicts with the rider, two observations are in order. First, insofar as CSA itself is concerned, the rider expressly authorizes normal legislative-executive relationships, and it prohibits only "publicity and propaganda." A similar prohibition applies to each agency of the government. There is nothing in the CSA rider that prevents CSA itself from discharging its statutory mission. Second, insofar as the grantees are concerned, we have reviewed the relevant legislation carefully; [5] and it is far from clear to us that any specific congressional purpose behind that legislation would be frustrated if CSA grantees were forbidden to use federal money to lobby for or against specific measures actually pending before Congress. More importantly, even if one could conclude that the grantees are authorized by the organic legislation to use federal money for lobbying purposes, Congress is under no obligation to make money available for that purpose in any given fiscal year. Indeed, the express language of the rider suggests that Congress has expressly declined to make money available for that purpose in the current fiscal year, and there is no principle of interpretation or construction that prevents executive officers or the courts from giving full effect to that fiscal purpose. It is true, as the General Counsel points out, that statutes should be construed harmoniously and that unnecessary conflicts should be avoided, but that principle carries little force in the appropriations context. Just as there is no presumption that the availability of funds alters substantive limitations on statutory authority, *see TVA* v. *Hill,* 437 U.S. 153 (1978), there is no presumption that Congress has made funds available for every authorized purpose in any given fiscal year. *See* Opinion of Comptroller General for Honorable F. James Sensenbrenner, Jr., printed in 127 Cong. Rec. H1843, 1845 (daily ed. May 5, 1981) ("An appropriation restriction may forbid the use of funds by an agency even for some activity authorized in its organic legislation.").

Traditional interpretation of the anti-lobbying statute and the general appropriations rider. As the General Counsel points out, the anti-lobbying statute and the general "publicity and propaganda" rider have been construed to prohibit federal officers and employees from using federal funds to mount "grassroots campaigns." We know of no reason to conclude that the same narrow construction should be given to the language of the second sentence of the CSA rider, which on its face imposes an unqualified prohibition against "any activity" by federal grantees designed to influence pending legislation. We have already noted the significant differences between the language of the CSA rider and the language of the other two provisions. There are more fundamental differences as well.

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[5] The relevant statutes are codified in scattered sections of Chapter 34 of 42 U.S.C. *See, e.g.,* 42 U.S.C. § 2790 *et seq.*, § 2861 *et seq.*, § 2981 *et seq.*

The Constitution contemplates that there will be an active interchange between Congress, the Executive Branch, and the public concerning matters of legislative interest. For that reason alone, this Department has traditionally declined to read the criminal statute and the general rider as requiring federal officers and employees to use their own funds and their own time to frame necessary communications to Congress and the public. We have taken the view that the criminal statute and the general rider impose no such requirement. They permit a wide range of contact between the Executive and the Congress and the Executive and the public in the normal and necessary conduct of legislative business.

The prudential considerations that underlie this narrow and necessary construction are largely irrelevant to prohibitions against lobbying by private persons and organizations that receive federal funds under federal grants and contracts. Although private persons and organizations have a right to petition Congress and to disseminate their views freely, they can be expected, within the framework established by the Constitution, to do their lobbying at their own expense. They have no inherent or implicit right to use federal funds for that purpose unless Congress has given them that right. In the case of the CSA grantees and other grantees covered by the rider, Congress appears to have expressly intended to forbid the use of federal funds by grantees for lobbying purposes.

Subsequent legislative history. The General Counsel declared that there is no formal legistative history that casts light on the legislative intentions behind the CSA rider. We do not disagree with that conclusion; however, the General Counsel relied upon a letter addressed to the Director of CSA by Senator Warren Magnuson, in which the Senator expressed the view that his subcommittee did not intend the rider to prevent CSA grantees from engaging in certain activities. We have described the contents of that letter in some detail in the paragraphs above.

When a legislative proposal is pending before Congress, the statements and reports of individual legislators or legislative committees concerning the meaning or effect of the proposal are part of the legislative record; and they carry force, as sources for interpretation, if the proposal is enacted into law. Because they were before the Congress and were presumably considered by Congress at the time of enactment, they are some evidence of what a majority of the Congress may have intended the proposal to accomplish. On the other hand, statements made by individual legislators and committees *after* enactment carry little force as a legal matter, because at best they are evidence only of what individual intentions may have been. Thus it is a traditional rule that "subsequent legislative history" is entitled to little weight in matters of statutory interpretation. *See, e.g., TVA* v. *Hill,* *supra; Regional Rail Reorganization Act Cases,* 419 U.S. 102, 132 (1974); *Allyn* v. *United States,* 461 F.2d 810, 811 (Ct. Cl. 1972); 2A Sutherland Statutory Construction § 48.16 (Sands ed. 1973).

In accordance with that rule, even if Senator Magnuson's statements had been made, not in a letter to the Director of CSA, but in a subsequent committee report or a subsequent congressional debate, they would carry little force as a matter of interpretation and would not be a sufficient basis for altering the conclusion that seems to be required by the plain meaning of the statutory language.

CSA grantees, and other grantees covered by the rider, may not use appropriated funds to engage in activities designed to influence legislation pending before Congress.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

President Reagan's Ability to Receive Retirement Benefits from the State of California

Payment to President Reagan of the state retirement benefits to which he is entitled is not intended to subject him to improper influence, nor would it have any such effect, and therefore his receipt of such benefits would not violate the Presidential Emoluments Clause. U.S. Const., Art. II, § 1, cl. 7.

Even if the Presidential Emoluments Clause were interpreted strictly on the basis of the dictionary definition of the term "emolument," it would not prohibit President Reagan's receipt of state retirement benefits since under state law those benefits are neither a gift nor a part of the retiree's compensation.

The role of the Comptroller General in enforcing compliance with the Presidential Emoluments Clause is debatable, the penalty for a violation is unclear, and the Constitution might in any case make questionable the withholding of any part of the President's salary for an indebtedness to the United States.

June 23, 1981

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This responds to your request for our opinion whether the receipt by President Reagan of the retirement benefits to which he became entitled as the result of his service as Governor of the State of California conflicts with the Presidential Emoluments Clause of the Constitution, which provides:

> The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and *he shall not receive within that Period any other Emolument from the United States, or any of them.*

U.S. Const., Art. II., § 1, cl. 7 (emphasis added).

We have been advised that, while serving as Governor of the State of California, the President elected to become a member of the Legislators' Retirement System pursuant to § 9355.4 of the California Government Code. He became entitled to, and has drawn, retirement benefits under that system since the expiration of his second term as Governor in 1975. The California Legislators' Retirement System is contributory, § 9357, and the benefits under it are based on length of service, § 9359. According to the decisions of the California courts, the benefits under the state retirement systems, including the one of which President

Reagan is a member, constitute vested rights. They are not gratuities which the state is free to withdraw. *Betts* v. *Board of Admin. of Pub. Employees' Ret. System,* 21 Cal. 3d 859, 863 (1978). *See also Kern* v. *City of Long Beach,* 29 Cal. 2d 848, 851, 853 (1947).

I.

The word "emolument" is an archaic term. The Oxford English Dictionary defines it as "profit or gain arising from station, office, or employment: reward, remuneration, salary." It also gives the obsolete meanings of "advantage, benefit, comfort." Webster's Third New International Dictionary contains similar definitions.

The extant records of the Constitutional Convention are silent regarding the purposes which Article II, § 1, clause 7, and related Article I, § 9, clause 8 [1] were intended to serve. Both clauses, however, were discussed during the State Ratification Conventions. *The Federalist No. 73,* attributed to Alexander Hamilton, explains that Art. II, § 1, clause 7 was designed to protect "the independence intended for him [the President] by the Constitution," so that neither Congress nor the states could

> weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice. Neither the Union, nor any of its members, will be at liberty to give, nor will he be at liberty to receive, any other emolument than that which may have been determined by the first act.[2]

Id. at 442.

Governor Randolph gave a similar explanation of the purposes underlying Article I, § 9, clause 8 in the Virginia Ratification Convention. He stated that it had been prompted by the gift of a snuff box by the King of France to Benjamin Franklin, then Ambassador to France. It therefore "was thought proper, in order to exclude corruption and foreign influence, to prohibit anyone in office from receiving or holding any emoluments from foreign states." 3 M. Farrand, Records of the Federal Convention of 1787 327 (rev. ed. 1937, 1966 reprint). Governor Randolph used the term "emolument" in the sense of a present rather than compensation for services. From this history, it appears that the term emolument has a strong connotation of, if it is not indeed limited to, payments which have a potential of influencing or corrupting the integrity of the recipient. To our knowledge, these two provisions were interpreted by federal authorities in that manner in all but one of the incidents in which this problem arose.

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[1] Article I, § 9, clause 8 provides in pertinent part "no person holding any Office of Profit or Trust under them [the United States] shall without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State."

[2] The "first act" refers to the legislation governing the President's compensation which is in effect at the beginning of the period for which he is elected.

In 1902 Acting Attorney General Hoyt explained that the purpose of Article I, § 9, clause 8 was "particularly directed against every kind of influence by foreign governments upon officers of the United States . . . ." 24 Op. Att'y Gen. 116, 117 (1902).

A similar approach was taken by the Comptroller General [3] in 1955 in the case of a former German judge who, after his removal from office by the national-socialist regime, had emigrated to the United States and become an attorney in the Department of Justice. After World War II, as the result of the German indemnification legislation, the enactment of which was required by the United States occupation authorities, he received from the German government a lump sum payment and an annuity for life in compensation for the wrongful dismissal. The Comptroller General ruled that those payments did not constitute emoluments directly stemming from his former office, but that they "represent damages payable as a direct result of a moral and legal wrong." 34 Comp. Gen. 331, 334 (1955). In addition the Comptroller General felt it "appropriate" to determine whether the receipt of the indemnity would violate the spirit of the Constitution. Referring to Acting Attorney General Hoyt's opinion, *supra*, he considered the test to be whether the payments were intended to influence, or had the effect of influencing, the recipient as an officer of the United States. The Comptroller General held that not to be the case in these circumstances. *Id.* at 335.

The same analysis of the problem was made by this Office in 1964 in connection with the question whether the estate of President Kennedy was entitled to the naval retirement pay that had accrued while he was President. A memorandum prepared in this Office was based on the consideration that Article II, § 1, clause 7 has to be interpreted in the light of its basic purposes and principles, *viz.*, to prevent Congress or any of the states from attempting to influence the President through financial awards or penalties. [4] It concluded that this constitutional purpose would be

> in no wise furthered by interpreting the clause as prohibiting the President from continuing to receive payments to which he was, prior to his taking office, entitled as a matter of law and for which he does not have to perform any services or fulfull any other obligations as a condition precedent to receipt of such payments.

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[3] On the role of the Comptroller General in this area, see the Annex to this memorandum.

[4] Since Robert Kennedy was Attorney General at the time when this matter was before the Department of Justice, it was felt that the Department of Justice should take no official position on the question involved. Instead, the Office of Legal Counsel furnished to the General Accounting Office a staff memorandum which "should not be deemed an official utterance of the Department. It is an unofficial work-product supplied for whatever the idea may be worth to you (the General Counsel, General Accounting Office)." Letter from Assistant Attorney General Schlei to General Counsel Keller, General Accounting Office, dated October 13, 1964, and attached staff memorandum, dated October 12, 1964.

The General Accounting Office denied the claim, not on the ground that its allowance would violate the Constitution, but on the statutory basis that the President had received active duty pay as Commander-in-Chief of the Armed Forces and therefore was precluded by 10 U.S.C. § 684 and 38 U.S.C. § 314(c) from receiving retired pay for the same period.[5]

Hence, if Article II, § 1, clause 7 is to be interpreted only on the basis of the purposes it is intended to achieve, it would not bar the receipt by President Reagan of a pension in which he acquired a vested right 6 years before he became President, for which he no longer has to perform any services, and of which the State of California cannot deprive him.

II.

The result would be the same, under California law, if Article II, § 1, clause 7 were interpreted exclusively on the basis of the dictionary meaning of the term emolument. The Comptroller General took that approach in 1957 when he was confronted with the question whether the receipt by a federal court crier of a pension from the British government for war services violated Article I, § 9, clause 8 of the Constitution. Disregarding the issue whether the receipt of the pension could have the effect of enabling the British government to influence the court crier in its favor, the Comptroller General ruled that the receipt of the pension would violate that constitutional provision, because a pension constituted either a "gratuity" or a "deferred compensation." If a "gratuity," it was a present, if "deferred compensation" was compensation for services and therefore came within the dictionary definition of the term emolument. 37 Comp. Gen. 138, 140 (1957).

Assuming, *arguendo*, that the Comptroller General was correct in limiting himself to the issue whether the pension was to be classified technically as a gift or compensation for services and, hence, constituted an emolument in the dictionary sense[6] regardless of whether it had the potential of influencing the recipient in favor of the British government, we would not say that his ruling was erroneous. Under British law the pension may have been a gift or compensation for past services. Rulings of the courts of California interpreting Article 16, § 6 of the California Constitution, which prohibits the gifts of public moneys, and Article 4, § 17 and Article 11, § 1, which prohibit the grant of extra compensation by local governments after services have been rendered, however, have determined that in California retirement benefits such as those received by President Reagan are neither gifts nor compensation for services.

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[5] Letter from General Counsel Keller, General Accounting Office, to Assistant Attorney General Schlei, dated November 1, 1964.

[6] *See*, however, state court decisions such as *Opinion of the Justices*, 117 N.H. 409, 411 (1977), and *Campbell* v. *Kelly*, 157 W. Va. 453, 464, 466 (1974), which point to the irrelevance of the dictionary definition of the term emolument in this context. Those decisions are based on the consideration that modern retirement systems do not give rise to the evils at which the prohibitions against emoluments, gifts, and pensions in 18th and 19th century constitutions were directed. They therefore conclude that these benefits are not "within the contemplation" of such prohibitions. On the development of pensions from arbitrary grants to favorites and persons "who could be counted on to do the government's bidding" to a politically neutral system of insurance, *see* 12 *Encyclopedia of the Social Sciences*, pp. 65–69, *s.v.* Pensions (1934).

The California courts have established firmly that the benefits under the California pension or retirement statutes are not gifts. *O'Dea* v. *Cook*, 176 Cal. 659, 661–62 (1917), *Sweesy* v. *Los Angeles etc. Retirement Board*, 17 Cal. 2d 356, 359–60 (1941), and the authorities there cited; *Kern* v. *City of Long Beach*, 29 Cal. 2d 848, 851, 853 (1947), and the authorities there cited.

California decisions holding that retirement benefits are not gratuities, however, frequently characterize them, as do rulings in other jurisdictions, as "deferred benefits" or "deferred compensation." See *Kern* v. *City of Long Beach, supra*, at 852, 855, *Miller* v. *State of California*, 18 Cal. 3d 808, 815 (1977). If retirement benefits actually constituted compensation, even though deferred, Article 4, § 17, and Article 11, § 1 of the California Constitution would prohibit them to be increased subsequent to the rendering of the services for which they were earned, in particular after retirement. The California courts, however, have realized, as have the courts of many other jurisdictions,[7] that the term "deferred compensation" is essentially convenient shorthand for the conclusion that retirement benefits are not gifts or gratuities, and that it may not be taken literally.

In *Sweesy* v. *Los Angeles, etc. Retirement Board, supra* at 361–63 (1941), which involved an increase of pension benefits after the employee had retired, the Supreme Court of California rejected the notion that pensions are simply additional or increased compensation and, observing (at 362) that the definition of retirement benefits as additional or increased compensation "may not be accurate in every case," it created the concept that pension benefits are derived from the "pensionable status,"[8] *See also Nelson* v. *City of Los Angeles*, 21 Cal. App. 3d 916, 919 (1971). Under California law retirement benefits therefore constitute an incident of the pensionable status. They are neither a gift nor a part of the retiree's compensation, earned while employed, the payment of which is deferred until after his retirement. In any event, regardless of any dictionary definition, retirement benefits are not emoluments within the meaning of the Constitution because interests of this kind were not contemplated by the members of the Constitutional Convention of 1789.[9]

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[7] Some states have held that the "deferred compensation" description of retirement benefits is misleading and that those benefits are *sui generis*, not readily subject to classification. *See, e.g. State ex rel. Wittler* v. *Yelle*, 65 Wash. 2d 660 (1965). Illinois and New Mexico liken retirement benefits to insurance contracts, *Raines* v. *Board of Trustees Pen. Fund*, 365 Ill. 610 (1937), *State ex rel. Hudgins* v. *Public Employees Retirement Board*, 58 N.M. 543 (1954). Still others hold that retirement benefits are not compensation for past services but an inducement to remain in service and to retire when superannuated. *See, e.g. Rochlin* v. *State*, 112 Ariz. 171 (1975).

[8] For an analysis of the concept of "pensionable status" *see Jorgenson* v. *Cranston*, 211 Cal. App. 2d 292, 298–300 (1962).

In sum, the receipt by President Reagan of his California retirement benefits does not violate the language of Article II, § 1, clause 7 of the Constitution because those benefits are not emoluments in the constitutional sense. Similarly, such receipt does not violate the spirit of the Constitution because they do not subject the President to any improper influence. The principal question presented by you therefore must be answered in the negative. In view of this conclusion, it is not necessary to answer the subsidiary questions raised in the last paragraph of your inquiry.

The Attorney General and Assistant Attorney General Olson have not participated in the preparation of this opinion.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Annex Attached

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[9] *See* n. 6, *supra.*

ANNEX

The role of the Comptroller General in this field is debatable. His involvement in this issue usually resulted from agency inquiries as to the legality of the payment of salary to employees who received payments from a foreign government. The opinions of January 12, 1955, 34 Comp. Gen. 331 (1955) and August 26, 1957, 37 Comp. Gen. 138 (1957) assume without explanation that an employee of the United States who accepts any emolument from a foreign government in violation of Article I. § 9, clause 8 of the Constitution forfeits the entire compensation for his employment by the federal government. The subsequent decisions of September 11, 1964, 44 Comp. Gen. 130 (1964) and of April 9, 1974, 53 Comp. Gen. 753, 758 (1974) concede that Article I, § 9, clause 8 does not specify the penalty to be imposed for its violation. The opinions, however, assert without any statutory basis that "substantial effect" can be given to the clause by withholding from the employee's pay an amount equal to the one which he received in violation of the Constitution. This result is in marked contrast to the position long held by the Comptroller General that in the absence of specific statutory authority his Office is not justified in setting off against the salaries of government employees any debts owed by them to the government, even if those debts are liquidated and undisputed. 29 Comp. Gen. 99 (1949).[10]

Additional problems would be presented if the Comptroller General sought to reduce the President's salary by the amount of the retirement benefits he receives from the State of California. Article II, § 1, clause 7 provides that the President's salary shall not be diminished during the period for which he shall be elected. The corresponding provision of Article III, § 1, which prohibits the diminution of the salary of Article III judges during their continuance in office, has been interpreted as prohibiting the withholding of a judge's statutory salary for an alleged indebtedness to the United States. *Smith* v. *Jackson,* 241 Fed. 747, 758 (D.C.C.Z. 1916), *aff'd on the opinion below,* 241 Fed. 747, 777 (5th Cir. 1917), *aff'd* 246 U.S. 388 (1918).

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[10] The Comptroller General adhered to this opinion as recently as May 8, 1979, File B-189154.

Applicability of 18 U.S.C. § 205 to Union Organizing Activities of Department of Justice Employee

The representational bar in 18 U.S.C. § 205 applies to union organizing activities of a federal employee in which he acts as "agent or attorney" for other federal employees before their agency.

The definition of "agency" in 18 U.S.C. § 6 is an expansive one, which establishes a presumption that a governmental entity is an agency for purposes of a given criminal offense, including offenses involving a conflict of interest, and includes entities in the legislative branch.

Even if certain provisions in Title VII of the Civil Service Reform Act (CSRA) specifically protect a federal employee's organizational and representational activities under that Act, notwithstanding the general bar in § 205, those provisions do not apply in this case because the employee group seeking recognition is not a "labor organization" under the CSRA.

June 26, 1981

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL, OFFICE OF JUSTICE ASSISTANCE, RESEARCH AND STATISTICS

This responds to your request that we reconsider our views on the applicability of 18 U.S.C. § 205 and the implementing Department of Justice regulations to Mr. A's activities as Executive Director of the Capitol Employees Organizing Group (CEOG). Our conclusion in these memoranda was that § 205 bars Mr. A from acting as agent or attorney before any department, agency, or court on behalf of employees of the Senate Restaurant in their efforts to organize and bargain with their employer, the Architect of the Capitol. Mr. A takes issue with this conclusion on grounds that § 205 was not intended to prohibit the sort of activity in which he wishes to engage, and that his activity is protected under Title VII of the Civil Service Reform Act of 1978 (CSRA), 92 Stat. 1111, 1191, 5 U.S.C. § 7101 et seq. After a careful review of the statutes at issue, we reaffirm our previous position.

Mr. A's counsel has suggested that § 205 should not be construed to apply to representational activities before organizational entities within the legislative branch such as the Office of the Architect of the Capitol (OAC). The argument, we assume, is that the OAC is not an "agency" as that term is used in § 205. It is true that the legislative history of the conflict of interest laws indicates that the representational bar of § 205 was not intended to prohibit services before "Congress or its committees." H.R. Rep. No. 748, 87th Cong. 1st Sess. 20 (1961). However, we can find no support for the notion that a similar exemption was intended to apply to other parts of the legislative branch. Indeed, the express extension of the § 205 representational bar to employees of the legislative branch indicates that Congress did not intend to limit the term "agency" to entities within the executive branch.

Moreover, the term "agency" is defined for purposes of Title 18 generally to include

> any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

18 U.S.C. § 6. This Office has in the past taken the position that the definition of "agency" in Title 18 is an expansive one which, in effect, establishes a presumption that a governmental entity is an agency for purposes of a given offense, including the conflict of interest statutes. We conclude, therefore, that the OAC is an "agency" as that term is defined in § 205 and that § 205 accordingly does apply to representational activities before that entity.

A second point raised by Mr. A is that even if § 205 does apply generally to representational activities before an agency of the legislative branch, the particular activities in which he wishes to engage are specifically protected under Title VII of the CSRA. *See* 5 U.S.C. § 7102. Therefore, he argues, the more general bar of § 205 should give way. We cannot agree that § 701 covers Mr. A's organizing activities on behalf of the Senate Restaurant employees.

Section 701 of the CSRA gives all covered employees the right "to form, join, or assist any labor organization." An employee's rights under this section include the right

> to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities . . . .

While Mr. A is concededly an "employee" enjoying the protections afforded by § 701, *see* 5 U.S.C. § 7103(a)(2), the CEOG does not appear to be a "labor organization" as that term is defined in Title VII of the

CSRA. *See* 5 U.S.C. § 7103(a)(4).[1] Accordingly, organizational and representational activities in its behalf are not protected under § 701.[2] Thus, even if Mr. A is correct that activities which are protected under § 701 would escape the § 205 bar, this argument avails him nothing in this case.

Finally, Mr. A argues that § 205 was not intended to prohibit the sort of representational activities in which he wishes to engage in behalf of the CEOG. While it is true that the legislative history of § 205 makes no specific mention of union organizing or representational activities, we cannot assume that Congress by its silence intended to enact an exception to the clear terms of the statutory prohibition—a prohibition which applies broadly to "*any* proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest . . . ." (Emphasis added.) We have been provided no information which would permit reconsideration of our earlier conclusion that at least some of Mr. A's proposed representational activities would be included on this comprehensive list. Nor do we understand Mr. A to contend that his role would not be that of an "agent or attorney" as those terms are used in the statute. We therefore have no basis on which to change our earlier conclusion that § 205 prohibits at least some of the representational activities he wishes to undertake.

We stress that § 205 does not bar Mr. A from aiding and assisting the Senate employees in their efforts to organize, as long as he does not act as their "agent or attorney." In addition, we should point out that § 205 contains an explicit exception which would allow an officer or employee to aid or assist "any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings." It may well be that some of the matters in which the CEOG Executive Director would represent Senate employees would fall into the category of a "personnel administration proceeding." We leave it to you to discuss with Mr. A which of his activities may be permissible under one or the other of these provisions.

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[1] A "labor organization" under Title VII of the CSRA is defined as "an organization composed in whole or in part of employees . . . ." 5 U.S.C. § 7103(a)(4). The term "employee" in turn is defined as an individual "employed in an agency." 5 U.S.C. § 7103(a)(2). In contrast to the expansive definition of "agency" in the Criminal Code, an "agency" is narrowly defined for purposes of Title VII coverage as "an Executive agency . . . the Library of Congress, and the Government Printing Office . . . ." 5 U.S.C. § 7103(a)(3). It is our understanding that the CEOG is composed exclusively of employees of the Senate Restaurant, who are employed by and subject to the administration and supervision of the Architect of the Capitol. If, as we conclude, the OAC is not an "agency" for purposes of Title VII coverage, the Senate Restaurant employees are not "employees" and the CEOG accordingly is not a "labor organization" under the Act. Mr. A might have a valid argument if the definition of the term "agency" were the same in Title VII and in Title 18, but that is not the case.

[2] We note that the National Labor Relations Board has reached a similar conclusion with respect to the analogous provisions of the National Labor Relations Act (NLRA). *See Capital Times Co.* 234 N.L.R.B. 309 (1978) (covered employee's refusal to cross picket line established by non-covered employees not protected activity under § 7 of the NLRA).

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Disaster Assistance and the Supremacy Clause

As an agency of the United States, acting pursuant to a valid delegation of the President's statutory authority to provide disaster assistance to states, the Federal Emergency Management Agency (FEMA) is not subject to state regulations or prohibitions which would impede the performance of its federal functions. However, the Supremacy Clause cannot be relied upon by FEMA to shield it from all state regulation of or objections to its disaster relief activities.

June 26, 1981

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, FEDERAL EMERGENCY MANAGEMENT AGENCY

You have asked for our opinion whether a state other than the state requesting assistance may, through enforcement of its laws and regulations, prohibit or substantially frustrate actions of the Federal Emergency Management Agency (FEMA) necessary to provide disaster assistance under the Disaster Relief Act of 1974, 42 U.S.C. §§ 5121–5202 (the Act). Your question envisions a situation in which FEMA, as an incident to providing disaster relief in a state which has requested it and for which the President has declared an emergency or major disaster, deems it necessary to conduct activities either within or which affect another state and which are objectionable to the latter state. You characterize your request as "unavoidably general." Treating it as general, we conclude, in the abstract, that, under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, FEMA, as an agency of the United States, is not subject to state prohibitions while administering disaster relief under the Act, as authorized by Congress and the President.[1] This conclusion, as is your question, is unavoidably general and is subject to the caveats discussed below.

In broad terms, it has been established since the Supreme Court's landmark decision in *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat) 316 (1819) that "the states have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id.* at 435. From this rule has flowed the corollary that, absent its consent, "the activities of the Federal Government are free from regulation by any state." *Mayo* v. *United States,* 319 U.S. 441, 445 (1943). These rules are subject to nuances. For instance, there is room for the states to tax and regulate the conduct of federal contractors in certain respects and under certain circumstances even though their actions may have an economic impact that indirectly burdens procurement by the United States. *See generally,* D. Weckstein, *State Power Over Intrastate Movement of Federal Property,* 11 Baylor L. Rev. 267 (1959) and cases cited therein at 273–81. But the Supreme Court has uniformly struck down, as violative of the Supremacy Clause, the direct, unconsented application by the states of their laws to the United States, its instrumentalities, and its employees working within the scope of their government employment. *E.G. Hancock* v. *Train,* 426 U.S. 167 (1976); *Mayo* v. *United States, supra*; *Arizona* v. *California,* 283 U.S. 423 (1931); *Johnson* v. *Maryland,* 254 U.S. 51 (1920); *Ohio* v. *Thomas,* 173 U.S. 276 (1899). We believe, based on this case law, that state attempts to regulate directly or prohibit the conduct of activities by FEMA and its employees (and other federal agencies and employees working at the direction of FEMA) deemed necessary to provide effective disaster relief under the Act would likewise violate the Supremacy Clause. A similar rule applies with respect to state regulation of the particulars of the performance of functions by contractors working directly under the orders of and to the specifications of FEMA. *Leslie Miller, Inc.* v. *Arkansas,* 352 U.S. 187 (1956); *Public Utilities Commission of California* v. *United States,* 355 U.S. 534 (1958).

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[1] Authority to administer disaster relief under the Act is vested in the President. The President has delegated his authority to the Director of FEMA. Exec. Order No. 12148 § 4-203, 3 C.F.R. 412 (1979).

An argument can be advanced that the general rules concerning the intergovernmental immunity of the United States and its instrumentalities under the Supremacy Clause should not apply with full force to the rendering of disaster assistance under the Act by FEMA. The premise of this argument is that, in providing disaster assistance within a particular state at the request of that state, FEMA is simply acting as an instrumentality of the state and is performing a state, rather than a federal, function. This being the case, the argument runs, its activities should not be regarded as immune from regulation by another state under the Supremacy Clause any more than would be the activities of the requesting state. We reject the premise.

We harbor no doubt that it is within the constitutional competence of the Congress, by law, to make the funds, equipment, expertise, and personnel of the United States available to supplement the efforts of the several states in providing disaster assistance to save lives and protect property and the public health and safety. It is also within the competence of Congress to place responsibility for the execution of that law in a federal official or instrumentality. When it does so, the execution of the law by the responsible official or agency is no less a federal activity than was the delivery of the mail in *Johnson* v. *Maryland, supra,* the operation of a bank in *McCulloch* v. *Maryland, supra,* or the sale of fertilizer in *Mayo* v. *United States, supra.* Congress enacted the Disaster Relief Act of 1974 and entrusted the execution of that law to the President. The President has validly delegated his authority under the Act to the Director of FEMA. When FEMA acts under that delegation to provide disaster relief, it is performing a federal function pursuant to a law validly enacted by Congress. That law is a part of the supreme law of the land and, under the Supremacy Clause, the states may not prohibit or, by regulation, significantly burden the manner of its execution without the consent of the United States.

That the principles of intergovernmental immunity under the Supremacy Clause are applicable to state prohibitions or attempted regulation of FEMA's disaster assistance activities under the Act does not mean that FEMA may totally ignore state law in all cases and on all subjects.

The Supreme Court has stated, in considering the immunity from the state law of government employees engaged in government business, that "It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets."*Johnson* v. *Maryland, supra,* 254 U.S. at 56 (dictum). Other courts have refused to excuse, on Supremacy Clause grounds, federal employees who violated routine state (or local) traffic laws from prosecution when the violations were not necessary to the accomplishment of their federal functions. *E.g., People of Puerto Rico* v. *Fitzpatrick,* 140 F. Supp. 398 (D.C. P.R. 1956); *People* v. *Don Carlos,* 47 Cal. App. 2d 863, 117 P.2d 748 (1941); *Commonwealth* v. *Closson,* 229 Mass. 329, 118 N.E. 653 (1918). *Cf. United States* v. *Hart,* 1 Pet. C.C. Rep. 390 (1817) (local constable who arrested postal employee for the 1817 version of speeding is not guilty of obstructing the mail, because the federal employee arrested was subject to local safety regulations, Congress not having affirmatively or by fair implication immunized mail carriers from such regulations); 5 Op. Att'y Gen. 554 (1852) (trains carrying U.S. mail are subject to municipal speed regulations). *Compare Montana* v. *Christopher,* 345 F. Supp. 60 (D. Mont. 1972) (in an emergency related to snow removal and flooding, a soldier ordered to use a trailer with defective brakes and signal lights is immune from state prosecution); *State* v. *Burton,* 41 R.I. 303, 103 A. 962 (1918) (dispatch driver for the Navy who, in time of war, is ordered to proceed "with all possible dispatch" is justified in violating state speed law). In light of this case law, caution dictates that federal employees and contractors should, to the extent possible, obey state traffic laws and other state or local laws, the violation of which is not necessary to the accomplishment of the federal function. However, in exigent circumstances in which violations of such laws are necessary to permit FEMA to perform essential disaster relief activities under the Act, the federal interest would, we believe, prevail. *Montana* v. *Christopher, supra; State* v. *Burton, supra.*[2]

We would also mention without elaboration two other circumstances in which the Supremacy Clause could not be relied upon by FEMA to shield it from state objections to its disaster relief activities. The first is the case in which proposed disaster relief activity would violate a federal law or regulation binding on FEMA and enforceable against it by the state. The second is the case in which the proposed disaster relief activity would consist of conduct which Congress has specifically subjected, although performed by the federal government, to state regulation.[3]

As stated, this opinion is general. We are prepared, at your request, to address more specific questions as they occur.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[2] For an interesting discussion, in a negligence case, of the relationship between the Supremacy Clause and state traffic regulations, *see Neu* v. *McCarthy,* 309 Mass. 17, 33 N.E. 2d 570 (1941).

[3] We mention these possibilities only as a cautionary note. We have no particular federal statutes or circumstances in mind. We note that the standard for judging whether Congress has subjected federal installations or activities to state regulation is a strict one.

> Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state action "clear and unambiguous."

Hancock v. *Train, supra,* 426 U.S. at 179 (footnotes omitted).

Constitutionality of the Proposed Revision of the International Traffic in Arms Regulations

Proposed revision of the "technical data" provision of the International Traffic in Arms Regulations (ITAR) redefines and narrows the class of transactions that are subject to a licensing requirement under the Arms Export Control Act of 1976, in an attempt to avoid imposing a prior restraint on speech protected by the First Amendment; however, even as revised the ITAR can have a number of constitutionally impermissible applications.

The licensing requirement in the ITAR may constitutionally be applied to transactions involving arrangements entered into by exporters to assist foreign enterprises in the acquisition or use of technology; it may also be applied to transactions involving the dissemination of technical data for the purpose of promoting the sale of technical data or items on the Munitions List, since the prior restraint doctrine has only limited applicability to "commercial speech." However, insofar as it could be applied to persons who have no connection with any foreign enterprise, who disseminate technical data in circumstances in which there is no more than a belief or a reasonable basis for believing that the data might be taken abroad by foreign nationals and used there in the manufacture of arms, the licensing requirement is presumptively unconstitutional as a prior restraint on speech protected by the First Amendment.

It is not certain whether a court would find that the revised ITAR are so substantially overbroad as to be void and unenforceable in all their applications, or decide to save the regulations through a narrowing construction. The best legal solution is for the Department of State, not the courts, to narrow the ITAR so as to make it less likely that they will apply to protected speech in constitutionally impermissible circumstances.

July 1, 1981

MEMORANDUM OPINION FOR THE OFFICE OF MUNITIONS CONTROL, DEPARTMENT OF STATE

The views of this Office have been requested concerning the constitutionality of a proposed revision of the "technical data" provisions of the International Traffic in Arms Regulations (ITAR). 45 Fed. Reg. 83,970 (December 19, 1980). On the basis of the analysis set forth below, we conclude that from a constitutional standpoint, the revised ITAR is a significant improvement over the prior version, but that even as revised, it can have a number of unconstitutional applications. We recommend that the proposed revision be modified to minimize or eliminate the number of impermissible applications. Our views are set forth in more detail below.

I. Background

The ITAR are promulgated pursuant to the Arms Export Control Act of 1976 (the Act). 22 U.S.C. § 2778. The Act authorizes the President "to control the import and export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services" and to "designate those items which shall be considered as defense articles and defense services . . . and to promulgate regulations for the import and export of such articles and services." § 2778(a). Items so designated are placed on the United States Munitions List. Every person engaging in the business of "manufacturing, exporting, or importing" designated defense articles or services must register with the Office of Munitions Control. § 2778(b). No such articles or services may be exported or imported without a license issued in accordance with regulations promulgated under the Act. § 2778(b)(2). Violation of the statute or the regulations promulgated thereunder is a criminal offense. Pursuant to its authority to regulate the export of "defense articles and services," the Office of Munitions Control has traditionally undertaken to regulate the export of technical *information* relating to the manufacture or use of items on the Munitions List. The "technical data" provisions are the embodiment of that undertaking.

The proposed revision defines technical data to include unclassified information not in the public domain and relating directly to, *inter alia,* the performance of defense services; training in the operation or use of a defense article; and design, production, or manufacture of such an article.[1] In general, the relevant provisions require the issuance of a license for the export of any unclassified technical data. A license is not, however, required for the export of unclassified technical data included within certain specified categories of exemption. Among those categories are exports of data published or generally available to the public,[2] exports in furtherance of a manufacturing license agreed to by the State Department, and exports related to firearms not in excess of caliber .50. Most importantly for present purposes, the revised provisions exempt technical data which:

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[1] Under § 121.315, "technical data" means:

(a) Unclassified information not in the public domain relating directly to:

(1) The design, production, manufacture, processing, engineering, development, operation, or reconstruction of an article; or

(2) Training in the operation, use, overhaul, repair or maintenance of an article; or

(3) The performance of a defense service (see § 121.32);

(b) Classified information relating to defense articles or defense services; and

(c) Information covered by a patent secrecy order.

45 Fed. Reg. 83,976 (1980)

[2] The ITAR exempts technical data if they "are published or otherwise generally available to the public":

(i) Through sales at newsstands and bookstores;

(ii) Through subscription, unrestricted purchase, or without cost;

(iii) Through second class mailing privileges granted by the U.S. Government; or,

(iv) Are freely available at public libraries.

45 Fed. Reg. 83,985 (1980)

> consists of information which is not designed or intended to be used, or which could not reasonably be expected to be used, in direct application in the design, production, manufacture, repair . . . of defense articles (for example, general mathematical, engineering, or statistical information not purporting to have or not reasonably expected to be given direct application to defense articles.) An advisory opinion may be sought in case of doubt as to whether technical data is exempt under this category.

45 Fed. Reg. 83,985 (1980).

With reference to technical data, the proposed revision defines the term "export" to include both the sending, transmitting, or removal of technical data from the United States, and the transfer of such data to a foreign national when the transferor knows or has reason to know that the transferred data will be sent, transmitted or taken out of the United States. Disclosure to a foreign national of technical data relating to "significant military equipment," whether in the United States or abroad, is also an "export." Finally, the proposed revision expressly provides that an "export" occurs when (1) technical data are disclosed to a foreign national abroad or (2) technical data are disclosed to a foreign national in the United States when the transferor knows or has reason to know that the disclosed technical data will be disclosed outside the United States.

II. Discussion

The constitutionality of the ITAR was considered and questioned in a memorandum prepared by this Office in 1978 at the request of Dr. Frank Press, Science Advisor to the President. *See* Memorandum of May 11, 1978, for Dr. Frank Press, Science Advisor to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel entitled "Constitutionality Under the First Amendment of ITAR Restrictions on Public Cryptography." On their face, the previous regulations appeared to establish a general administrative rule that required persons subject to United States jurisdiction to apply to the Department of State for a license before communicating technical data to foreign nationals. The regulations were drafted in such a way that this rule could have been applied not only to persons who undertook to transmit technical data during the sale of arms or technical services abroad, but also to virtually any person involved in a presentation or discussion, here or abroad, in which technical data could reach a foreign national. In all such circumstances, anyone who proposed to discuss or transmit technical data was, under the ITAR, an "exporter"; and he was therefore required by the ITAR to apply in advance for an administrative license, unless the technical data in question fell within the limited exemptions from regulation.

In the memorandum to Dr. Press, this Office concluded that the ITAR cast such a broad regulatory net that it subjected a substantial range of constitutionally protected speech to the control of the Department of State. Because this control was exercised through a system of administrative licensing—a system of "prior restraint"—we concluded that the relevant regulations were presumptively unconstitutional. We also concluded, however, with particular reference to cryptographic information, that the constitutional difficulties presented by this system of prior restraint might be overcome without limiting the range of transactions to which the ITR purported to apply. The difficulties might be overcome if: (1) the standards governing the issuance or denial of an administrative license were defined more precisely to guard against arbitrary and inconsistent administrative action; and (2) a procedural mechanism was established to impose on the government the burden of obtaining prompt judicial review of any State Department decision barring the communication of cryptographic information.

The present proposal for revision of the ITAR does not attempt to satisfy the second condition described in the previous memorandum. It does, however, redefine the class of transactions that are subject to the licensing requirement. It is therefore necessary to determine whether the redefinition of coverage is sufficiently responsive to the constitutional objections raised by our previous opinion concerning the issue of prior restraint to require a different conclusion. If the redefinition of coverage ensures that the licensing requirement can no longer apply to speech that is constitutionally protected against prior restraint, the concerns expressed in our previous opinion will no longer be relevant to the constitutional analysis. On the other hand, if the redefinition does not significantly contract the coverage, the prior restraint doctrine must be taken into account. We adhere to the positions regarding constitutional limits in this area articulated in the memorandum to Dr. Press. If the revised technical data provisions are drafted so broadly that they impinge on speech that is protected against prior restraint, they are presumptively unconstitutional in their application to the speech. Moreover, if their overbreadth is substantial, they may be void and unenforceable in all their applications, although we cannot fully assess that possibility without examining the constitutional status of the entire range of transactions to which they may apply.

The revised technical data provisions may apply to three general categories of transactions: (1) transactions involving the direct transmission of technical data by an exporter to a foreign enterprise under a contract or other arrangement entered into by the exporter for the purpose of assisting the foreign enterprise in the acquisition of use of technology; (2) transactions involving the dissemination of technical data for the purpose of promoting or proposing the sale of technical data of items on the Munitions List; and (3) transactions in which an "exporter" who is not otherwise connected or concerned with any foreign enterprise transmits technical data knowing, or having reason to know, that the data may be taken abroad and used by someone there in the manufacture or use of arms.

We have concluded that the application of the revised technical data provisions to transactions in the first two categories described above will not violate the First Amendment prohibition against prior restraint. However, the application of these provisions to transactions in the third category will raise serious constitutional questions. Our ultimate conclusions about the constitutionality of the technical data provisions are set forth, together with our recommendations for revision, in section III below.

(1) *Transactions involving arrangements entered into by exporters to assist foreign enterprises in the acquisition or use of technology.* At its core, the ITAR is designed to control United States firms and individuals who undertake to assist foreign enterprises in the acquisition and use of arms. The purpose of the technical data provisions is to extend that control to transactions in which assistance takes the form of technical advice. Perhaps the most common example of a transaction of that kind is a straightforward commercial arrangement in which an American firm agrees to provide technical information or advice to a foreign firm engaged in the manufacture of an item or items on the Munitions List.[3]

The leading case involving the constitutionality of the ITAR arose in precisely that context. *See United States* v. *Edler Industries, Inc.*, 579 F.2d 516 (9th Cir. 1978). In *Edler*, an American firm specializing in aerospace technology, Edler Industries, agreed to provide a French firm with technical assistance and data relating to a tape wrapping program. The Office of Munitions Control denied Edler's application for export licenses on the ground that exportation of the information in question would violate United States policy as established by the Act. During the pendency of the license applications, and after the denial, Edler proceeded to perform the contract and transmitted the information to the French firm. Edler was then prosecuted under the Act. Edler defended on the ground, among others, that the transmission of technical information under the contract with the French firm was constitutionally protected "speech" and that the government could not require such "speech" to be licensed in advance. The trial court rejected that contention and Edler was convicted.

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[3] We can imagine more exotic examples that would proceed upon essentially the same legal footing, *e.g.*, a transaction in which an American agent (an "industrial spy") transmits sensitive technical information to his foreign principal.

On appeal, the Ninth Circuit upheld Edler's defense in part. The court concluded that the definition of "technical data" then appearing in 22 CFR § 125.01 (1977) should be interpreted narrowly in light of the applicable constitutional limitations, § 1934 of the Act,[4] and the relevant legislative history. Under the Act, the regulations should be construed to bar "only the exportation of technical data significantly and directly related to specific articles on the Munitions List." *Id.* at 521. Moreover, if the information in question "could have both peaceful and military applications," the regulations should be construed to apply only in cases in which the defendant knew or had reason to know that the information was "intended for the prohibited use." *Id.* That construction was necessary "to avoid serious interference with the interchange of scientific and technological information." *Id.* If the regulations and the statute were construed to apply only in the case of knowledge or reason to know of an intended prohibited use, they would not "interfere with constitutionally protected speech." *Id.* They would merely control "the conduct of assisting foreign enterprises to obtain military equipment and related technical expertise," and for that reason they would not impose an unconstitutional prior restraint on speech. *Id.* Finally, although the district court had correctly rejected certain elements of the defendant's First Amendment defense, it had adopted an impermissibly broad construction of the regulations, and therefore the case was ordered retried in accordance with the narrower construction.

On the facts presented, the essential holding of *Edler*—that the previous ITAR could be applied constitutionally to an exporter who had agreed to assist a foreign firm in the development of a new technology, having reason to know that the foreign firm intended to use the technology to manufacture items on the Munitions List—was consistent with the traditional principles the courts have applied in the interpretation of the First Amendment. Indeed, the novelty of *Edler* lay not in that holding, but in the defendant's claim that the transmission of technical information under the agreement with the French firm was constitutionally protected "speech." The courts have consistently held that whenever speech is an "integral part" of a larger transaction involving conduct that the government is otherwise empowered to prohibit or regulate, the First Amendment does not immunize that speech; nor does it bar prior restraint. *See, e.g., Ohralik* v. *Ohio State Bar Assn.,* 436 U.S. 447, 456 (1978), and cases cited therein; *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490 (1949). That principle comes into play in a number of contexts: most importantly, where speech is joined with conduct by an agreement or special relationship between the speaker and the actor. For example, under the law of conspiracy, when one individual enters into an agreement with another to rob a bank or to restrain trade and provides the other with the information which facilitates that action, neither the agreement nor the transmission of the information is constitutionally protected. *See id.*

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[4] This provision was repealed in 1976 and replaced by the current provision, 22 U.S.C. § 2778. For purposes of the interpretation adopted by the *Edler* court, however, the changes in § 1934 are not material.

To be sure, there is a doctrinal difficulty in applying this traditional analysis to international transactions of the kind involved in *Edler.* When the defendant in *Edler* agreed to assist the French firm in the development and use of sensitive technology, it was not undertaking to aid that firm in conduct that was itself illicit or unauthorized as a matter of domestic law. Our nation has a compelling interest in suppressing the development and use of sensitive technologies abroad, but it has no general power to "outlaw" the development of technology by foreign enterprises or to require them to apply here for a license before making or using arms. As a matter of domestic law, the government's only recourse is to control persons subject to United States jurisdiction who would undertake to aid and abet those foreign endeavors.

We believe that the absence of a direct domestic prohibition against the foreign conduct in question here—the foreign manufacture or use of items on the Munitions List—does not create a constitutional barrier to domestic regulation of persons who combine with foreign enterprises to assist them in the development and use of sensitive technology. Even though such assistance may take the form of technical advice, it is, in the *Edler* context, an integral part of conduct that the government has a compelling interest in suppressing by appropriate means. As the *Edler* court held, such assistance is not constitutionally protected speech; and it is not protected by the constitutional prohibition against prior restraint.

We have one further observation concerning the *Edler* case. *Edler* held that the licensing requirement of the previous ITAR could be enforced where: (1) the foreign recipient of technical data intended to use it in the manufacture or use of items on the Munitions List; and (2) the exporter had "reason to know" of that intention. Given the nature of the transaction that was involved in *Edler,* those requirements imposed what the Ninth Circuit considered to be necessary limitations on the power of the government to license the transmission of sensitive technical information under international contracts and combinations.[5]

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[5] There is room to doubt whether the concise and somewhat ambiguous language adopted by the *Edler* court in the statement of the applicable rule, *see* 579 F.2d at 521, completely captures the relevant constitutional standard. The *Edler* rule presupposes that the foreign enterprise intends to use technical data in the manufacture or use of arms, and it suggests that the licensing requirement can be enforced only where the exporter has reason to know of that intention. But a respectable argument can be made that the constitutional power of the government to license persons who combine with foreign enterprises to assist directly in the development of sensitive technology abroad is not limited to cases in which the foreign enterprise has a present intention of using that technology in the manufacture of arms. The present intention of the foreign actor is constitutionally relevant, of course, but the actual source of the danger is the technical capacity that his action creates. That capacity is created on

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They should be read in that context. We believe they cannot be read as implicitly authorizing the imposition of a general licensing requirement in every circumstance in which a speaker may have known or had reason to know that his speech could be used for a dangerous purpose by someone abroad. Beyond the *Edler* context—a context in which "speech" is joined with dangerous conduct by an actual agreement or combination between speaker and actor—constitutional principles far more favorable to the speaker come into play. We will discuss those principles in part (3) below.

(2) *Transactions involving the dissemination of technical data for the purpose of promoting or proposing the sale of technical data or items on the munitions list.* In this section, we consider the dissemination of technical data for the purpose of promoting or proposing the sale of technical data or items on the Munitions List.[6] The Supreme Court has given special consideration to promotional materials in a series of recent decisions. Under the rubric of "commercial speech," information that proposes or promotes a commercial transaction has been accorded some constitutional protection. *See Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748 (1976); *Friedman* v. *Rogers*, 440 U.S. 1 (1979); *Central Hudson Gas* v. *Public Service Comm'n*, 447 U.S. 557 (1980); *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85 (1977). Commercial speech is protected because it "assists consumers and furthers the societal interest in the fullest possible dissemination of information." *See Central Hudson Gas, supra,* at 561–62. At the same time, it has been suggested by the Court that commercial speech is in some circumstances entitled to a "lower level" of protection than that accorded to other forms of protected speech. The courts have said that a "lower level" of protection is justified because "commercial speakers have extensive knowledge of both the market and their products" and are thus "well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity," and because "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" *Id.* at 564 n.6 (citation omitted). These factors have led the Supreme Court to conclude that the govern-

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foreign soil, beyond the legislative jurisdiction of the United States, and our government may have no adequate means of controlling its subsequent use in a way that will protect against a change of circumstance or intention. Accordingly, one could argue that our nation has a substantial interest in suppressing the creation of foreign capacity in the first instance, whatever the present intentions of the foreign enterprise may be; and if a United States technical expert, knowing of the potential danger, combines with the foreign enterprise to create that capacity, that is arguably enough. An analogous principle is operative in the law of espionage. The transmission of sensitive information by a domestic agent to his foreign principal is not constitutionally protected even where the purpose of the transaction is merely to benefit the foreign power, not to injure the United States. As the Supreme Court noted in the leading case, the status of foreign governments may change; no advantage can be given to them without creating a potential for injury to us. *See Gorin* v. *United States*, 312 U.S. 19, 30 (1941).

[6] We are advised by the Federal Bureau of Investigation that technical data are sometimes disseminated in international conferences or meetings for the purpose of promoting the sale of sensitive technology.

ment may ban false or misleading commercial speech, *see Friedman* v. *Rogers, supra,* at 13, 15-16, and, in at least some contexts, commercial speech relating to illegal activity, *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 388 (1973). Similar considerations have led the Court to suggest in dicta that the ordinary First Amendment prohibitions against overbreadth and prior restraint may not be fully applicable to commercial speech. *See Virginia State Bd. of Pharmacy, supra,* at 772 n.24.

For purposes of the present discussion, we need not determine whether the prior restraint doctrine is inapplicable to all commercial speech in all circumstances. In the present context, we believe that a licensing requirement for promotional speech that contains technical data would probably be held constitutional. There are four reasons for this conclusion. First, the governmental interest in preventing the development of military equipment by foreign countries is a significant one. That interest may justify prior restraint against the promotion of foreign technical sales in the same way that the national interest in truth and fair dealing justifies prior restraint against false and deceptive promotions in the ordinary commercial context. *See Donaldson* v. *Read Magazine,* 333 U.S. 178, 189-91 (1948); *FTC* v. *Standard Education Society,* 302 U.S. 112 (1937). Second, a licensing requirement for promotional materials containing technical data will not delay the transmission of information that the public has a strong interest in receiving immediately. In that respect, technical promotions are unlike political speech, for the public will not generally suffer if technical data are suppressed during a licensing period. *Compare New York Times* v. *United States, supra.* Third, the protection accorded to commercial speech is largely designed to protect the rights of listeners and consumers. *See Virginia State Bd., supra.* Those rights are not directly implicated here. Foreign enterprises engaged in the manufacture or use of arms abroad generally have no right under the Constitution to receive information from persons in this country. Finally, the Court has indicated that deference to the political branches is most appropriate in the area of military affairs. *Cf. Rostker* v. *Goldberg,* 453 U.S. 57 (1981); *Brown* v. *Glines,* 444 U.S. 348 (1980).[7] On the basis of these factors, and the intimation in *Virginia State Bd.* that the strong presumption against prior restraints may not be fully operable in the commercial context, we believe that the courts would, in general, uphold a licensing requirement for promotional speech that contains technical data.

Whether the "commercial speech" doctrine has any other bearing upon the constitutionality of the technical data provisions is not entirely clear. The Court has given little guidance concerning the meaning of the operative term. In *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 455–456 (1978), the Court indicated that "commercial speech" is "speech proposing a commercial transaction." *See also Virginia Pharmacy Board, supra.* In *Central Hudson Gas*, by contrast, the Court described "commercial speech" as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. This characterization prompted a separate opinion from Justice Stevens, joined by Justice Brennan, suggesting that such a definition was far too broad: "Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward." *Id.* at 579–80.

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[7] Because Congress' determinations are of special importance here, it would be useful to obtain clear and specific legislative authority for the technical data regulations. In addition, it may be advisable to provide remedies other than criminal penalties for violation of the ITAR provisions, such as civil sanctions.

The contours of the "commercial speech" concept are suggested by the facts of the cases that have recognized the commercial speech doctrine. As we have said, speech that promotes a commercial transaction falls within the category. *See id.* (advertisements promoting purchase of utility services and sales of electricity); *Virginia State Bd., supra* (advertisements for pharmaceutical products); *Linmark Associates, supra* (advertisements for real estate); *Friedman* v. *Rogers, supra* (use of trade name by optometrists). Thus far, the characterization as "commercial speech" has been largely confined to speech that merely promotes the sale or purchase of a product or service; in no case has it been applied to nonpromotional material simply because the speaker or writer is motivated by an economic interest, or because he is selling the information for a profit. We do not believe that the Court would hold that the transmission of technical data is "commercial speech" merely because the exporter charges a fee for its disclosure. Such a holding would prove far too much. It would sweep a broad range of fully protected expression into the commercial speech category. Writers of all varieties—political, literary, scientific, philosophical—often charge a fee for the books or articles they produce. There is no authority for the proposition that, simply by virtue of the fact that the documents are transferred for a fee, they are not protected by the First Amendment.

On the other hand, as we have suggested, the dissemination of technical data for the purpose of promoting the sale of a defense article or service would appear to be "commercial speech," and the constitutional barriers to prior restraints may well have a diminished applicability to the dissemination of technical data in that context. As applied to such speech, the ITAR may well be constitutional, given the substantial governmental interest in suppressing the technical data and the qualified nature of the First Amendment protection that is accorded to promotional materials.

(3) *Transactions in which an exporter, unconnected with any foreign enterprise, disseminates technical data knowing or having reason to know that the data may be taken abroad and used there in the manufacture or use of arms.* Read in light of the relevant exemptions and definitions, the revised technical data provisions can be applied to any person who proposes to disseminate technical data in circumstances in which he knows or has reason to know that the information will be transmitted or taken abroad and used in the manufacture or use of arms. This coverage is so broad that the revised provisions could be applied in a number of factual settings to persons who are not directly connected or concerned in any way with any foreign conduct carrying dangerous potential for the United States. They could be applied, for example, to communications of unclassified information by a technical lecturer at a university or to the conversation of a United States engineer who meets with foreign friends at home to discuss matters of theoretical interest.

On the basis of the *Edler* decision, we believe that the technical data provisions may be applied constitutionally to persons or firms who combine (with the requisite *scienter*) with foreign enterprises to assist them in the development of sensitive technological capacities. In the absence of special circumstances,[8] however, there is a critical constitutional difference between direct and immediate involvement in potentially dangerous foreign conduct, as in *Edler,* and the speech of the lecturer or the engineer in the examples given above. The difference is a factual one—the difference between conspiracy and assembly, incitement and informing—but it is no less important for constitutional purposes. *See Whitney* v. *California,* 274 U.S. 357, 376–77 (1927) (Brandeis, J., concurring). On the far side of that critical line, speech is not protected when it is brigaded with conduct; on the near side, it is at least arguably protected. Speech does not lose its protected character solely because the circumstances of the case give rise to a reasonable fear that persons other than the speaker may be moved or enabled by the speech to do dangerous things at remote times and places. *See Brandenburg* v. *Ohio,* 395 U.S. 444 (1969).[9] Finally, if speech is arguably protected by the First Amendment, it may not be subjected to prior restraint except in the most extraordinary cases. Prior restraint against arguably protected speech is presumptively unconstitutional. *See Pittsburg Press Co.* v. *Pittsburgh Comm'n on Human Relations, supra.*

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[8] Special circumstances would include a grave and immediate threat to national security, as where important military information is being communicated to an adversary for current use against the United States. *See New York Times* v. *United States,* 403 U.S. 713 (1971).

[9] In *Brandenburg,* the Court held that speech would not be protected if it was both "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action." 395 U.S. at 447. The "directed to inciting" language at least arguably requires a showing of intent. Accordingly, when intent is absent, speech is—again at least arguably—protected by the First Amendment and may not, therefore, be suppressed by means of a prior restraint. A different conclusion may be appropriate, however, if very grave harm would definitely result from the disclosure. *See New York Times* v. *United States, supra.*

In accordance with these principles, we conclude that, in general, the revised technical data provisions cannot constitutionally be applied to the dissemination of technical data by persons having no direct connection with foreign conduct in settings in which there is no more than belief or a reasonable basis for believing (1) that a foreign national may take the technical data abroad and (2) that the data could be used by someone there in the manufacture or use of items on the Munitions List.[10] In the absence of special circumstances that would justify prior restraint, such speech is arguably protected and, as a general rule, cannot be subjected constitutionally to the revised licensing requirement.

III. Conclusion and Recommendation

We have concluded that the revised technical data provisions can have constitutional and unconstitutional applications. As a matter of constitutional doctrine, that conclusion would require a court to consider whether the provisions are so substantially overbroad that they are void and unenforceable in all their applications. *See Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973). For the present, however, we will forgo that inquiry in favor of three more pragmatic considerations.

First, *Edler* itself demonstrates that the problems presented by facial overbreadth do not necessarily prevent the enforcement of a licensing requirement in cases in which such a requirement can otherwise be constitutionally enforced. The *Edler* court saw its task as one of saving a necessary system of regulation, and it therefore chose to "construe" the statute and the applicable regulations narrowly to avoid the overbreadth problem and to preserve the possibility of enforcing the system against a criminal defendant (Edler) whose "speech" may not have been constitutionally protected. That approach was consistent with the approach that the Supreme Court itself has taken in some First Amendment cases. *See Civil Service Commission* v. *Letter Carriers,* 413 U.S. 548 (1972). It is an approach that may be taken when new cases arise under the revised technical data provisions.

Second, there is no absolute guarantee that other courts will be as concerned with saving the regulations as the *Edler* court was. The decision whether to enforce the overbreadth doctrine or to save the regulation through narrow "construction" is in part a matter of judicial discretion; and we cannot exclude the possibility that a court would hold the technical data provisions substantially overbroad, and therefore void.

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[10] As *Edler* suggests, a different conclusion may be appropriate if the data have only military applications, or if the defendant knows such an application is intended. Even in such contexts, however, there may be situations in which the First Amendment bars a prior restraint: consider, for example, a lecture on technical data having exclusively military uses when nationals of American allies are in the audience. We do not, however, conclude that the ITAR is unconstitutional with respect to all transactions falling within this category; we merely suggest it has a number of unconstitutional applications.

For obvious reasons, the best legal solution for the overbreadth problem is for the Department of State, not the courts, to narrow the regulations. In our judgment, the regulations should be narrowed to make it less likely that they will apply, or be seen to apply, to protected speech falling within the general category described in part 3 of section II above. We would respectfully recommend that an effort be undertaken along that line.[11]

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[11] We also recommend the legislative changes referred to in note 7, *supra.*

Authority of the Special Counsel, Merit Systems Protection Board, Over Anonymous Allegations of Wrongdoing

Anonymous complaints do not trigger the statutory scheme by which the Office of the Special Counsel (OSC), Merit Systems Protection Board, investigates allegations of wrongdoing within an agency; however, such complaints may be forwarded to the head of the affected agency by the OSC in its discretion, to be dealt with by the agency.

July 1, 1981

MEMORANDUM OPINION FOR THE SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD

This responds to your inquiry whether the Office of the Special Counsel (OSC), Merit Systems Protection Board, has the statutory authority to forward anonymous allegations of wrongdoing to the heads of the affected agencies,[1] pursuant to 5 U.S.C. § 1206(b)(2).[2] For reasons stated hereafter, we do not believe that the statute was intended to cover such material and we therefore conclude that the material may not be forwarded as (b)(2) material. Such material may be forwarded to affected agencies, however, without the provision of (b)(2) being triggered.

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[1] This question arose because of our earlier opinion that OSC may only forward complaints received from federal employees. Memorandum Opinion for the General Counsel, Nuclear Regulatory Commission, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, March 13, 1981. [NOTE: The March 13, 1981, Memorandum Opinion appears in this volume at p .77 *supra*. Ed.]

[2] Section 1206(b)(1) and (2) of Title 5, United States Code, states:

> (1) In any case involving—
>
> (A) any disclosure of information by an employee or applicant for employment which the employee or applicant reasonably believes evidences—
>
> (i) a violation of any law, rule, or regulation; or
>
> (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
>
> if the disclosure is not specifically prohibited by law and if the information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
>
> (B) a disclosure by an employee or applicant for employment to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information which the employee or applicant reasonably believes evidences—
>
> (i) a violation of any law, rule or regulation; or
>
> (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
>
> the identity of the employee or applicant may not be disclosed without the consent of the employee or applicant during any investigation under subsection (a) of this section or under paragraph (3) of this subsection, unless the Special Counsel determines that the disclosure of the identity of the employee or applicant is necessary in order to carry out the functions of the Special Counsel.
>
> (2) Whenever the Special Counsel receives information of the type described in paragraph (1) of this subsection, the Special Counsel shall promptly transmit such information to the appropriate agency head.

Forwarding information pursuant to (b)(2) triggers an elaborate statutory scheme. OSC may require an agency to conduct an investigation and submit a detailed written report within 60 days. 5 U.S.C. § 1206(b)(3)(A), (4), 5 C.F.R. § 1252.2 (1980). This report must be submitted to Congress, the President and the Special Counsel, 5 U.S.C. § 1206(b)(5)(A), and possibly the Office of Management and Budget. Even if OSC does not require an investigation, the head of the agency must make a written report within 60 days regarding action taken. *Id.*, § 1206(b)(7), 5 C.F.R. § 1252.3 (1980). Failure to file reports may be reported to Congress and the President. 5 U.S.C. § 1206(b)(5)(A). This scheme was designed to encourage federal workers to "blow the whistle" if they suspect the existence of wrongdoing in their agency. *See* 124 Cong. Rec. 27,548, 27,569–72, 34,100, 25,727–28 (1978). It was meant both to protect them from reprisals by setting up stringent safeguards to protect their identity, *see* 5 U.S.C. § 1206(b)(8), 5 C.F.R. § 1250.3(c) and App. I (1980), and to assure them that their complaints would be looked into seriously by requiring mandatory reports from the agencies. Permitting individuals who are unwilling to give their names, even with these statutory protections, to trigger these provisions would not only consume the finite resources of OSC and the agencies but would also turn the law into what its sponsors explicitly said it was not—"an open invitation to any disgruntled Federal employee . . . to make false allegations of wrongdoings by a Federal agency." 124 Cong. Rec. 27,572 (1978) (remarks of Sen. Dole).

We believe that the statute requires the identification of the complainant in order to effect several purposes. First, identification ensures that the complainant is "an employee or applicant for employment" as required by the statute. 5 U.S.C. § 1206(b)(1)(A), (B). *See also* 5 U.S.C. § 1206(b)(3)(B). Second, it allows the Special Counsel to solicit additional information, if necessary, from the complainant when determining whether there is a "substantial likelihood" that the information discloses a violation of the law and thus to eliminate the drain of investigating fraudulent or frivolous claims. Third, it permits the Special Counsel to comply with the mandate of the statute that he "*shall*" inform the complainant of the agency's report on its investigation or action. 5 U.S.C. § 1206(b)(5)(A), (7) (emphasis added).

This is not to say that OSC must ignore anonymous complaints. Nothing in the statute forbids OSC from forwarding such complaints to an agency—the statute only precludes them being sent as official (b)(2) material.[3] Therefore, while anonymous information should not be forwarded pursuant to 5 U.S.C. § 1206(b)(2), and reports on it should not be required pursuant to 5 U.S.C. § 1206(b)(3) and (7), the information may be forwarded at OSC's discretion—and dealt with at the agency's discretion—in order to identify possible problems.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

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[3] In addition, OSC is empowered to investigate possible prohibited personnel practices, even in the absence of an allegation, 5 U.S.C. § 1206(a)(3), and several other classes of improper conduct, 5 U.S.C. § 1206(e), 5 C.F.R. § 1251.1(b), (c), regardless of the source.

material.[9] Therefore, willful nonreporting information should not be forwarded pursuant to 5 U.S.C. § 1206(b)(2) and reports should not be required pursuant to 5 U.S.C. § 1206(b)(3) and (7); the information may be forwarded at OSC's discretion—and dealt with at the agency's discretion—in order to identify possible problems.

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The Attorney General's Authority to Represent the Roosevelt Campobello International Park Commission

Under the international agreement creating the Roosevelt Campobello International Park Commission and its implementing legislation, the Attorney General may provide free legal representation to the Commission. However, he is under no obligation to do so, particularly where a conflict of interest would make questionable the appropriateness of such representation.

The Attorney General's statutory obligation to "supervise and control" litigation of the Commission in courts of the United States does not require him to conduct such litigation, or retain private counsel on behalf of the Commission, any more than it empowers him to control access by this international body to U.S. courts. It only means that when the Attorney General does conduct or finance litigation of the Commission, he must retain supervision and control over it.

In cases where the Commission is suing an agency of the United States, it is appropriate for the Department to refuse the Commission's request for representation. The Department also may withdraw from representation of the Commission that has already been undertaken, as long as such withdrawal is accomplished in accordance with applicable American Bar Association standards.

July 6, 1981

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

This responds to your request for an opinion clarifying the Attorney General's authority and responsibility to provide legal representation to the Roosevelt Campobello International Park Commission. You have expressed special concern about pending and prospective litigation by the Commission against the United States government. Our advice can be summarized as follows:

(1) The Attorney General is under no legal obligation to conduct or finance new litigation brought by or against the Commission.

(2) The Attorney General does have the authority, subject to his other responsibilities, to conduct or finance litigation on behalf of the Commission.

(3) The Attorney General should not attempt to prevent the Commission from using its own funds to sue the United States. However, the President may prevent the initiation of such suits in the future by directing the United States members of the Commission to vote to oppose suits against the United States.

(4) Subject to the terms of any binding contractual commitments, the Department may withdraw from financing the Commission's pending litigation against the United States, but we recommend that it not do so without taking reasonable steps to avoid prejudice to the Commission.

Discussion

The Roosevelt Campobello International Park Commission was established pursuant to an agreement between the United States and Canada to administer the estate once owned by President Franklin Roosevelt as an international park. Agreement Between the Government of the United States of America and the Government of Canada Relating to the Establishment of the Roosevelt Campobello International Park, Jan. 22, 1964, United States-Canada, 15 U.S.T. 1504, T.I.A.S. No. 5631 (1964) [hereinafter cited as Agreement]. The Agreement provides that the Commission shall be composed of six members, three Americans and three Canadians, and that the affirmative vote of at least two members from each country is required for any decision to be taken by the Commission. Agreement, Art. 3, at 1505. It also provides that the Commission shall have "juridical personality and all powers and capacity necessary or appropriate for the purpose of performing its functions" including the powers and capacity to "sue or be sued in either Canada or the United States." Agreement, Art. 2, at 1505. In addition, the Agreement provides that the costs of operating and maintaining the Park shall be shared equally by the governments of the United States and Canada Agreement, Art. 11, at 1507, and that "arrangements" may be made with the competent agencies of both governments for rendering, without reimbursement, such services as the Commission may request for the orderly development, maintenance and operation of the Park. Agreement, Art. 9, at 1507.

The legislation implementing the Agreement which was adopted by Congress reiterates the essence of the Agreement. 16 U.S.C. §§ 1101–1113. Among other things, it provides that the American members of the Commission shall be appointed by the President and hold office at his pleasure. 16 U.S.C. § 1104(a). The "functions" of the Commission are to accept title to the estate, to take the measures necessary to restore the property to its original condition, and "to administer" the Park "as a memorial." 16 U.S.C. § 1102. In describing the powers of the Commission, the statute provides that the Commission shall have "juridical personality and all powers and capacity necessary or appropriate for the purpose of performing its functions" including the power and capacity

> to sue or be sued, complain and defend, implead and be impleaded, in any United States district court. *In such suits, the Attorney General shall supervise and control the litigation.*

16 U.S.C. § 1103(c) (emphasis added).[1] The statute also enumerates the Commission's power

> to obtain without reimbursements, for use either in the United States or Canada, legal, engineering, architectural, accounting, financial, maintenance, and other services, whether by assignment, detail, or otherwise, from competent agencies in the United States or in Canada, by arrangements with such agencies.

16 U.S.C. § 1103(j). In recognition of this government's responsibility to share equally in the costs of developing and operating the Park, the statute also authorizes the appropriation of such sums as may be necessary to fulfill our obligations under the Agreement. 16 U.S.C. § 1113.[2]

Obligation and authority to provide legal services. Both the Agreement and the United States legislation contemplate that the Commission may make "arrangements" with United States agencies for free services, and the statute makes it plain that legal services are among the types of free services contemplated. *See* 16 U.S.C. § 1103(j). We do not believe that the statute imposes an obligation on any agency of the United States to provide free legal services to the Commission, particularly in litigation against the United States. Although we recognize an intention in these provisions that government agencies cooperate with the Commission when feasible, we do not believe that § 1103(j) or the Agreement should be read to create an obligation for agencies of either government to satisfy every request of the Commission.[3] Rather, we read these provisions as a grant of authority to government agencies to cooperate with the Commission and as an endorsement of such cooperation, whenever such agencies, in the exercise of their discretion, believe that such cooperation is lawful and otherwise appropriate.[4]

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[1] The italicized language is a substantive addition to the parallel provision in the Agreement. The Canadian implementing legislation does not contain a similar provision requiring supervision or control of Commission litigation in Canada. Roosevelt Campobello International Park Commission Act, 1964, ch. 19, 1964–65 Can. Stat. 135.

[2] There have been annual appropriations to the Department of the Interior for this purpose. *See* Pub. L. No. 96–514, 94 Stat. 2957; Pub. L. No. 96–126, 9[illegible] Stat. 954; Pub. L. No. 95–465, 92 Stat. 1279; Pub. L. No. 95–74, 91 Stat. 285; Pub. L. No. 94–373, 90 Stat. 1043; Pub. L. No. 94–165, 89 Stat. 977; Pub. L. No. 93–120, 87 Stat. 429.

[3] The statement of C. P. Montgomery, Assistant Director, National Park Service, Department of the Interior, before the Senate Foreign Relations Committee, supports our view that these provisions should be read to authorize "cooperation" from United States agencies. *See* S. Rep. No. 1097, 88th Cong., 2d Sess., 9 (1964).

Similarly, we do not find an obligation to represent the Commission in the language of § 1102(c) of the statute concerning the Attorney General's supervision and control of Commission litigation. As we see it, the supervision and control of litigation is not necessarily the same as actually conducting the litigation. Although the two functions may be performed by the same person or entity, this need not be the case. In the private sector, for example, it is not uncommon for the general counsel of a corporation to supervise and control corporate litigation, while outside counsel actually conducts the litigation. In the government context, the authority to conduct and to supervise litigation is separately delineated, *see* 28 U.S.C. §§ 516, 519, although both functions most frequently reside in the Department of Justice. There are situations, however, where Congress has given another Department the authority to conduct litigation, subject to the supervision and control of the Attorney General. *See, e.g.,* 42 U.S.C. §§ 7171(i), 7192(c) (involving Department of Energy litigation). In light of this distinction, we are persuaded that Congress would have used different, and more explicit, language in § 1102(c) if it intended to require the Attorney General to conduct litigation or retain private counsel on behalf of the Commission.

Having concluded that § 1102(c) does not create an obligation to conduct litigation for the Commission, we must nonetheless ascribe some intended meaning to the mandate to "supervise and control" the Commission's litigation. Reading broadly, the term could imply that the Attorney General may prevent the Commission from asserting particular positions or that he may deny the Commission access to federal district courts altogether.[5] Such a construction, however, would give this government more unilateral power than can be found in the Agreement [6] and would tend to conflict with Article 2 of the Agreement which provides that the Commission shall have "juridical personality" and be empowered to "sue and be sued" in United States district courts.

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[4] As we indicated in our October 10, 1978, opinion regarding the representation of Campobello, the Attorney General's authority to conduct litigation includes the authority to retain private counsel at government expense when a conflict of interest prevents direct representation.

[5] We have not been asked to consider whether the particular litigation in which the Commission is now engaged is "necessary or appropriate for the purpose of performing its functions." 16 U.S.C. § 1103. Of course, this government may express its views on that question through its representatives on the Commission.

[6] Under the Agreement, the power of one government to control the positions of the Commission lies in the exercise of its voting rights. *See* Article 3. Since the United States members of the Commission serve at the pleasure of the President, the President could prevent the problem of litigation against the United States by directing the United States members to vote against the initiation of such suits. However, once begun, the United States vote would not be sufficient to terminate the litigation without the support of two Canadian votes.

It is an established principle of construction that a statute will not be read to modify or abrogate obligations under an international agreement without a clear expression by Congress that such was its purpose. *See Cook* v. *United States,* 288 U.S. 102 (1933). Thus, without a clear expression by Congress that the United States enabling legislation was intended to modify the international Agreement by giving a single United States official the power to limit the Commission's access to the United States courts, we would be disinclined to read § 1103(c) to confer that power. Since nothing in the enabling legislation or its legislative history indicates such an intent,[7] a more narrow construction of the term "supervise and control" seems appropriate.

As mentioned previously, Congress clearly anticipated that the Commission could arrange for free legal services from the Justice Department. We think that § 1103 should be read to mean that when the United States government does provide representation for the Commission in federal court, the Attorney General must maintain control of that litigation. Supervision and control of the litigation in these circumstances would be essential to maintain the integrity of the government's legal position before the federal courts. Section 1103 may also be read to require that among federal agencies, only the Justice Department may conduct litigation for the Commission.

In sum, we conclude that neither the international agreement nor the implementing legislation require the Department of Justice to provide legal services to the Commission. In cases where the Commission is suing an agency of the United States, it is especially appropriate for the Department to refuse the Commission's request for representation. Furthermore, in light of our conclusion that there is no underlying obligation to provide representation, we believe that the Department also may withdraw its personnel or funds from representation of the Commission that has already been undertaken. However, as discussed below, the Department should ensure that any withdrawal is accomplished in an appropriate and reasonable manner.

Withdrawal from litigation. The Justice Department applies the Code of Professional Responsibility of the American Bar Association (ABA Code) to its legal activities and personnel. *See* 28 CFR 45.735-1(b). The Code generally discourages lawyers from withdrawing from employment absent good cause. *See* ABA Code DR 2-110(C). We believe that the Department can make a showing of good cause for withdrawal under DR 2-110(C)(6) at least with respect to Commission litigation that involves the assertion of positions that are contrary to those of the United States, for which Congress has made no specific appropriation to retain private counsel. This position would be enhanced in cases where the litigation may be arguably beyond the scope of the Commission's responsibilities. Although the ABA standards may not be applicable to a situation where the Department wants to withdraw from financing rather than conducting Commission litigation, we would nonetheless advise you to use the good cause standard as a guide for your conduct in this situation. *Cf.* ABA Code DR 5-107(B) (involving the influence of professional services by third parties who pay legal fees on behalf of the client).

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[7] The legislative history gives virtually no attention to the question of litigation authority or the extent of the Attorney General's mandate to "supervise and control" Commission litigation.

Should you determine that there is good cause and that it is otherwise appropriate [8] to withdraw from representing the Commission in a given case, the ABA Code provides guidance on the manner of withdrawal. DR 2-110(A)(2) provides that

> [A] lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

We are aware from the materials you provided that the Department has entered into "contracts" and exchanged other correspondence with counsel retained on behalf of the Commission. It does not appear, from our quick review of these materials, that there could be any construction of these "contracts" that would bind the Department to pay the private lawyer beyond the monetary ceiling set for the particular matter or the end of the fiscal year—whichever occurs sooner. However, we think that you are in a better position to assess the Department's "contractual" obligations as an initial matter. In any event, in light of our other advice, you may not be prepared to withdraw financial support for the employment of private counsel in particular cases before the end of this fiscal year. Accordingly, we have not addressed the contractual issue at this time. If it becomes necessary to do this in the future, we would be pleased to assist you.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[8] It may be advisable as a matter of policy to consult with the State Department and the National Park Service before undertaking a withdrawal from Commission litigation.

Constitutionality of the Death Penalty Provision of 18 U.S.C. § 1111

Because of the unfettered discretion conferred on the sentencing authority by 18 U.S.C. § 1111, the death penalty may not constitutionally be imposed under that statute.

In the absence of express legislative authorization, federal district judges have no power to devise procedures which would satisfy the requirements dictated by the Supreme Court's death penalty decisions.

July 17, 1981

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

This memorandum responds to your request for the views of this Office as to whether the government may seek the death penalty under 18 U.S.C. § 1111 [1] in the manner and under the circumstances set forth in your memorandum and in the materials attached thereto. For the reasons stated below, we believe that 18 U.S.C. § 1111 is unconstitutional under governing decisions of the Supreme Court, and that the constitutional infirmities can be remedied only through legislation, not through executive or judicial action.

I. Introduction

This Office has recently surveyed the recent decisions of the Supreme Court on the death penalty, and we will not discuss those decisions in detail here.[2] In *Furman* v. *Georgia,* 408 U.S. 238 (1972), the Court struck down a state statute providing for the death penalty on the ground that it did not provide sufficient guidance to ensure against arbitrary infliction of capital punishment.[3] In *Gregg* v. *Georgia,* 428 U.S.

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[1] In relevant part, 18 U.S.C. § 1111(b) provides, "Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment,' in which event he shall be sentenced to imprisonment for life."

[2] See Memorandum Opinion of April 30, 1981, for the Assistant Attorney General, Criminal Division from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel. "Constitutionality of Statute Imposing Death Penalty for Attempted Assassination of the President" [NOTE: The April 30, 1981 Memorandum Opinion is reprinted in this volume at p. 116 *supra.* Ed.]

[3] Justice Douglas concluded that the statutes were "pregnant with discrimination," 408 U.S. at 256–57; Justice Stewart believed that under the statutes, capital punishment was "so wantonly and so freakishly imposed," 408 U.S. at 310; and Justice White emphasized that the penalty was too infrequently imposed to serve the ends of criminal justice, 408 U.S. at 312–13.

153 (1976), the Court upheld a Georgia statute enacted in response to *Furman*. The plurality of three Justices emphasized four features of the statute: (1) the sentencer's attention was drawn to the particular circumstances of the crime and of the defendant by reference to certain specified aggravating and mitigating factors; (2) the discretion of the sentencer was controlled by clear and objective standards; (3) the sentencer was provided with all relevant evidence during a separate sentencing hearing; and (4) there was a system of appellate review to guard against arbitrariness. 428 U.S. at 158 (Stewart, Powell, & Stevens, JJ.). Two other Justices expressed the view that the death penalty was in all circumstances cruel and unusual punishment prohibited by the Eighth Amendment. 428 U.S. at 227 (Brennan, J., dissenting); 428 U.S. at 231 (Marshall, J., dissenting). The *Gregg* decision requires a state or federal court to conduct a separate sentencing hearing in death penalty cases in which the sentencer's discretion is confined within relatively narrow limits specified in statute and administered by the trial judge. The Court has been careful to ensure that trial courts comply with the strict requirements of *Gregg. See Godfrey* v. *Georgia*, 446 U.S. 420 (1980); *Lockett* v. *Ohio*, 438 U.S. 586 (1978). Nonetheless, the Court has upheld statutes that are different in a variety of ways from the Georgia statute; all such statutes provide for a "bifurcated" proceeding, but the precise nature of the proceeding is allowed to vary substantially. *See Proffitt* v. *Texas*, 428 U.S. 242, 248–57 (1976); *Jurek* v. *Texas*, 428 U.S. 262, 267–68 (1976).

II. Discussion

The question presented here is whether 18 U.S.C. § 1111 could be found constitutional if a district court were, despite the absence of express statutory authorization, to conduct a separate sentencing hearing in compliance with *Gregg*. The statute itself, which was passed in 1948, provides for no such hearing, and its language suggests that a separate hearing is not contemplated ("unless the jury qualifies its *verdict* . . . .") 18 U.S.C. § 1111(b) (emphasis added). There is nothing in the statute's legislative history to suggest that such a hearing is required or permitted. In these circumstances, the question is basically a mixed one of statutory construction and "inherent" judicial authority: whether, under 18 U.S.C. § 1111, Congress intended to authorize a district court to devise procedures complying with *Gregg*, or whether the courts have inherent power to devise such procedures.

It bears emphasis that the development of procedures for a bifurcated proceeding for the imposition of the death penalty would require considerable creativity on the part of the district court. The court would have to devise an entirely separate sentencing proceeding and to elect among the various procedures that the Court has upheld in such proceedings. For example, the court might compose an elaborate list of mitigating and aggravating circumstances, *see Gregg* v. *Georgia, supra,* or determine that particular questions should be asked of the jury relating to the defendant's capacity for future acts of violence, *see Jurek* v. *Texas, supra.* No statute, of course, presently provides federal judges with guidance for making these determinations. As a result, each federal district court would fashion its own procedures, leading to inconsistency on an issue that basically requires uniformity. That alone might doom the procedure under *Furman.*

The decision of the Supreme Court in *United States* v. *Jackson,* 390 U.S. 570 (1968), strongly suggests that 18 U.S.C. § 1111 does not grant such broad-ranging powers to federal district judges. At issue in *Jackson* was the constitutionality of the Federal Kidnapping Act, 18 U.S.C. § 1210(a), which provided a death penalty for certain kidnappers "if the verdict of the jury shall so recommend." The defendant argued that this provision impermissibly penalized his assertion of the right to trial by jury: if the defendant pleaded guilty or waived a jury trial, no death penalty could be imposed; but if the defendant exercised his constitutional right to such a trial, the death penalty might be available. The Government responded that, to avoid the constitutional infirmity, the statute should be construed to allow the judge "to convene a special jury for the limited purpose of deciding whether to recommend the death penalty." 390 U.S. at 572. The Court characterized as "untenable" the suggestion that the Act "authorizes a procedure unique in the federal system—that of convening a special jury, without the defendant's consent, for the sole purpose of deciding whether he should be put to death." 390 U.S. at 576–77. In terms apparently applicable here, the Court stated:

> The Government would have us give the statute this . . . meaning without the slightest indication that Congress contemplated any such scheme. Not a word in the legislative history so much as hints that a conviction . . . might be followed by a separate sentencing proceeding before a penalty jury. . . . [E]ven on the assumption that the failure of Congress to [authorize the requested procedure] was wholly inadvertent, it would hardly be the province of the courts to fashion a remedy. . . . It is one thing to fill a minor gap in a statute—to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.

390 U.S. at 578–80.

In our view, *Jackson* strongly suggests that, in the absence of affirmative statutory language or history to the contrary, a federal statute will not be construed to authorize a federal district judge to conduct a separate sentencing hearing. This general rule would be particularly likely to be accepted in this context. If 18 U.S.C. § 1111 were to be saved through adoption of the *Gregg* procedures, the district judge would be required, not merely to hold a separate hearing, but also to devise an elaborate set of procedural safeguards to comply with the Supreme Court's rulings in the death penalty area. As *Jackson* concludes, the creation of such safeguards is a legislative task. In the absence of congressional authorization, we believe that it is extremely unlikely that a death penalty would be upheld pursuant to a judicially created *ad hoc* exercise of that power.[4]

Moreover, even those decisions that suggested before *Jackson* that a separate sentencing proceeding is in some contexts within judicial authority would not, in all likelihood, allow a court to devise, under 18 U.S.C. § 1111, a proceeding to comply with *Gregg*. In the context under discussion, the task would not be simply one of bifurcating a trial, with reasonably clear standards set down by the legislature to govern each stage; the task would, rather, entail the far more difficult step of conducting a separate sentencing proceeding under standards and procedures that must in substantial part be developed by the district court. In light of the *Jackson* decision and the heretofore unanimous views of the Executive, Legislative, and Judicial Branches with respect to the unconstitutionality of 18 U.S.C. § 1111, we do not believe that the courts would be permitted to "rescue" that provision through their own creativity even if the establishment of a separate proceeding would be permissible under standards laid down by Congress.

This conclusion is buttressed by the apparent unanimity in the views of all three branches that the dealth penalty may not be sought under 18 U.S.C. § 1111. At least six courts have expressly so declared. *United States* v. *Denson,* 588 F.2d 1112, 1119 n.6 (5th Cir. 1979), *rev'd on other grounds,* 603 F. 2d 1143 (5th Cir. 1979) (*en banc); United States* v. *Weddell,* 567 F.2d 767, 770 (8th Cir. 1977), *cert. denied,* 436 U.S. 919 (1978); *United States* v. *Kaiser,* 545 F.2d 467 (5th Cir. 1977); *United States* v. *Woods,* 484 F.2d 127, 138 (4th Cir. 1973) *cert. denied,* 415 U.S. 979 (1974); *United States* v. *Collins,* 395 F. Supp. 629, 635 n.8 (M.D. Pa. 1975), *aff'd,* 523 F.2d 1051 (3d Cir. 1975); *United States* v. *Freeman,* 380 F. Supp. 1004 (D.N.D. 1974).

The *Kaiser* decision is illustrative. In that case, the court construed § 1111 as conferring "unfettered discretion on the sentencing authority," thus running afoul of *Furman.* 545 F.2d at 471. The court noted that it had been unable to find a reported case in which a United States Attorney had sought the death penalty under § 1111, and observed that in *United States* v. *Watson,* 496 F.2d 1125, 1126, n.3 (4th Cir. 1973), the Government conceded "that any death penalty imposed under § 1111 would be void." 545 F.2d at 471. *See also United States* v. *Johnson,* 425 F. Supp. 986 (E.D. La. 1976), in which the court stated that the federal death penalty for rape was unconstitutional because "the statute sets forth no guidelines for the trial judge to follow in determining whether or not the death penalty should be imposed. This lack of any requirement of consideration by the Court of mitigating or aggravating circumstances compels a finding that the federal statute does not conform to the type of statute approved [by the Court] . . .; and, accordingly, that portion of [the statute] which leaves the imposition of the death penalty completely to the discretion of the trial court is unconstitutional." 425 F. Supp. at 986.[5]

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[4] Before the Court's decision in *Jackson*, there was some uncertainty in the lower courts as to whether and under what circumstances a separate penalty proceeding could be ordered. *See United States* v. *Curry,* 358 F.2d 904 (2d Cir.), *cert. denied,* 385 U.S. 873 (1966); *Frady* v. *United States,* 348 F.2d 84 (D.C. Cir.), *cert. denied,* 382 U.S. 909 (1965). *See also Spencer* v. *Texas,* 385 U.S. 554, 567 n.12 (1967) (noting "questionable desirability of this untested technique" but allowing it to be left "to the discretion of the trial court"). In a footnote in *Jackson*, the Court observed that "[i]t is not surprising that courts confronted with such problems have concluded that their solution requires 'comprehensive legislative and not piecemeal judicial action.' " 390 U.S. at 580 n.17 (citation omitted).

Similarly, the activity of Congress in the death penalty area suggests an understanding on its part that legislation would be necessary in order to provide for a federal death penalty after *Furman.* The Antihijacking Act of 1974, 49 U.S.C. §§ 1472 & 1473, was enacted after *Gregg* and places considerable constraints on the jury's discretion. The legislative history indicates that Congress understood that *Furman* invalidated a number of federal death penalty provisions, including § 1111. H.R. Rep. No. 885, 93rd Cong., 2d Sess. 14–15 (1974). Congressional action to reinstitute the death penalty only with respect to the Antihijacking Act in light of knowledge that § 1111 was unconstitutional may be found significant. A number of additional bills have been introduced to restore the federal death penalty. The most recent, S. 550 in the 97th Congress, would attempt to comply with *Gregg* by imposing the necessary procedural safeguards.

Finally, as noted above, we are informed that the Department of Justice, through the Criminal Division, has taken the position that the death penalty may not be sought under 18 U.S.C. § 1111. The consistent interpretation of a statute by the institution charged with its enforcement is accorded considerable deference by the courts. *See United States* v. *Kaiser,* 545 F.2d 467.

This unanimity of view among the three branches of government strongly supports the conclusion that § 1111 does not authorize a district court to undertake the essentially legislative task of composing its own procedural safeguards in order to comply with *Gregg.*

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[5] To be sure, the prosecutor did not in any of these cases request the court to conduct a bifurcated proceeding of the sort upheld in *Gregg.* Nonetheless, the courts' unanimous view that the statutes were unconstitutional under *Furman* is not encouraging for the view that judicial "amendment" of the statute to conform to *Gregg* would be permissible.

III. Conclusion

Neither the language nor the legislative history of 18 U.S.C. § 1111 suggests that district judges have been authorized to devise a separate sentencing hearing with procedures complying with the Supreme Court's death penalty decisions. Indeed, the Court's ruling in *Jackson* suggests that courts do not ordinarily have the authority to establish such procedures. The apparent unanimity of views among the three branches since *Furman*—that 18 U.S.C. § 1111 is unconstitutional in its current form—supports this conclusion. For these reasons, we believe that the death penalty may not be sought under 18 U.S.C. § 1111.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Constitutionality of Proposed Revisions of the Export Administration Regulations

Proposed revisions of the Export Administration Regulations dealing with the export of technical data to foreign nationals apply a prior restraint, in the form of a licensing requirement, to a wide variety of speech protected by the First Amendment. There is thus a considerable likelihood that in their current form the regulations would be invalidated as unconstitutionally overbroad. The regulations would also be vulnerable to constitutional attack on grounds of vagueness. If the regulations were cast not as a licensing scheme but as a form of subsequent punishment, they could cover a far broader range of conduct.

A licensing system is likely to be held constitutional only if it applies narrowly to exports which are likely to produce grave harm under the test set forth in *New York Times Co. v. United States,* 403, U.S. 713 (1971).

July 28, 1981

MEMORANDUM OPINION FOR THE DIRECTOR, CAPITAL GOODS PRODUCTION MATERIALS DIVISION, DEPARTMENT OF COMMERCE

This will respond to your request for the views of this Office on the constitutional issues raised by your draft revision of Part 379 of the Export Administration Regulations. Those regulations clarify the circumstances in which a license is required for the export of technical data to foreign nationals. We believe that the regulations, as currently drafted, have a number of unconstitutional applications, and that they should therefore be substantially revised in order to meet the constitutional objections. In the discussion below, we offer a general statement of our reasoning, together with some suggestions for possible revision.

I. Background

The general purpose of the regulations is to require a license before the "export" of "technical data," subject to two exceptions discussed below. Under the regulations, technical data is defined as "information and know-how of any kind that can be used, or adapted for use, in the design, production, manufacture, repair, overhaul, processing, engineering, development, operation, maintenance, or reconstruction of commodities." The term "commodity" encompasses a wide range of articles compiled on the Commodities Control List. Many of the articles fall generally in the broad category of "high technology" items, including, but not limited to, items subject to direct use for military purposes. However, the definition of commodities also embraces items with only indirect military application. An "export" is defined as an actual shipment or transmission of technical data out of the United States; any release of technical data in the United States with knowledge or intent that the data will be shipped or transmitted from the United States to a foreign country; and any release of technical data of United States origin in a foreign country.

Under the regulations, a critical distinction is made between "basic research"—research "directed toward an increase in knowledge"—and "applied research"—research "directed toward the practical application of knowledge." In addition, "development" is defined as the systematic use of knowledge directed toward the design and production of useful prototypes, materials, devices, systems, methods, or processes.

The regulations grant a general license for two broad categories of technical data. The first category provides a general license applicable to all destinations and includes three subcategories, of which the first consists of data "made generally available to the public" through release at conferences that are open to the public in the sense that the general public or a range of qualified participants is eligible to attend. This license appears designed to cover conferences in which the information will not be closely held because of the generally open nature of the proceedings. The second subcategory consists of exports resulting from "basic [scientific] research," but "applied research" is specifically excluded from this license. The third consists of data "released through formalized classroom instruction . . . at commercial, academic, government or private institutions," provided that the instruction does not give access to applied research or development activities.

The second broad category provides a general license to a limited number of countries for two subcategories of technical data. The first consists of data in such forms as manuals or instruction books, provided that they are sent as part of a transaction directly related to commodities licensed for export and that they are not directly related to the production of commodities wholly or in part. The second subcategory includes technical data supporting a bid, lease, or offer to sell.

For all other exports of technical data, a license is required.

II. Discussion

The Export Administration Regulations represent an effort to serve the legitimate interests of the United States in controlling the dissemination of information to foreign countries, especially when the result of such dissemination may be the development of military equipment. The courts, however, have been almost invariably unwilling to uphold licensing schemes that require government approval before particular information may be disclosed. Such schemes amount to "prior restraints," which are presumed invalid and subject to an exceptional burden of justification. *See New York Times Co.* v. *United States,* 403 U.S. 713 (1971). The courts have never held that the technical and scientific materials involved here—which, to be sure, do not contain political speech—are entitled to less than full protection under the First Amendment. In order to ensure that the regulations at issue here will survive judicial scrutiny under the First Amendment, we believe that it will be necessary to revise them and thus to guarantee that the legitimate interests that they attempt to promote will in fact be served if the regulations are challenged in court.

In a recent memorandum, this Office commented on the constitutional issues raised by a revision of the "technical data" provisions of the International Traffic in Arms Regulations (ITAR). *See* Memorandum Opinion of July 1, 1981, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, for the Office of Munitions Control, Department of State.* In that memorandum, we divided the technical data provisions of the ITAR into three general categories, applying a separate First Amendment analysis to each. The first category included transactions involving arrangements entered into by exporters to assist foreign enterprises in the acquisition or use of technology. Following the decision in *United States* v. *Edler Industries, Inc.,* 579 F.2d 516 (9th Cir. 1978), we concluded that technical data exported during the course of such transactions fell into the same general category as communications made during the course of a criminal conspiracy. The courts treat such communications not as speech protected from prior restraint, but as an integral part of conduct that the government has a right to prevent. *See Ohralik* v. *Ohio State Bar Ass'n,* 436 U.S. 447, 456 (1978), and cases cited. We concluded, therefore, that technical data transmitted during the course of such transactions could constitutionally be subjected to a licensing requirement.

The second category consisted of technical data divulged for the purpose of promoting or proposing the sale of technical data or items on the munitions list. We concluded that this form of "commercial speech" would probably not be held subject to the prior restraint doctrine in light of the lower level of protection sometimes accorded to that speech and the substantial government interests at stake. *See Central Hudson Gas & Elec.* v. *Public Service Comm'n,* 447 U.S. 557 (1980).

The third category consisted of technical data disseminated by an exporter who is unconnected with any foreign enterprise, but who knows or has reason to know that the data may be taken abroad and used there in the manufacture or use of arms. Speech in this category, we concluded, would generally be protected from prior restraint. The

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* Note: The July 1, 1981, Memorandum Opinion is reprinted in this volume, at p. 206, *supra*. Ed.

Court has made clear that the First Amendment protects the right of Americans to communicate with foreigners, even if the foreigners are citizens of adversaries of the United States. *See Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); *see also Kleindienst* v. *Mandel*, 408 U.S. 753 (1972).[1] The Court has also made clear that a prior restraint can be imposed only in the most compelling circumstances. *See New York Times Co.* v. *United States*, 403 U.S. 713 (1971). In the absence of such circumstances—such as a grave and immediate threat to national security, as where important military information is being communicated to an adversary for current use against the United States—speech falling in this category is protected from prior restraint. *See id.*

We believe that this general framework is the proper one from which to analyze the restrictions at issue here. Applying that framework, it is apparent that the revised regulations apply a prior restraint, in the form of a licensing requirement, to a wide variety of protected speech falling in the third category described in our memorandum on the ITAR. For example, scientists and researchers must obtain a license for exports of technical data resulting from applied research. The results of such research are, however, entitled to full protection under the First Amendment. Similarly, the regulations subject university instruction to a licensing requirement if the instruction includes applied research or development activities. This requirement applies a prior restraint to protected speech and is thus impermissible except in the most compelling circumstances. For example, we do not believe that the courts would uphold a requirement that a professor obtain a license before "releasing" information to foreign students simply because the information may be used in the overhaul of certain kinds of computer chips. The same considerations suggest that an American scientist could not be barred in advance from informing his colleagues, some of whom are foreign nationals, of the results of an experiment that could help produce some other high technology item. Other examples could readily be imagined. In more general terms, the regulations cover a wide variety of speech that is constitutionally protected. We believe that they should therefore be substantially narrowed. Indeed, the range of impermissible applications is sufficiently great, and the number of permissible applications so comparatively small, that there is a considerable likelihood that in their currrent form the regulations would be invalidated as substantially overbroad under *Broaderick* v. *Oklahoma*, 413 U.S. 601 (1973).

We note in addition that the regulations are vulnerable to claims of vagueness in two critical respects. First, the distinction between "applied research" and "basic research" seems to be too thin to support the conclusion that "applied research" can in all contexts be subjected to the licensing requirement. Second, the definition of an export as a "release of technical data . . . with knowledge or intent that the data will be . . . transmitted from the United States to a foreign country" is highly ambiguous. In order to be subject to the licensing requirement, must the speaker know with a high degree of certainty that the data will be so transmitted? Or, as we have been told informally, is it sufficient if he knows that foreign nationals are among his audience? If the first interpretation is adopted, the regulations will of course be substantially more narrow.

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[1] The Court has apparently not authoritatively determined whether and to what extent Americans have First Amendment rights while travelling abroad. *See Haig* v. *Agee*, 453 U.S. 280 (1981) (assuming such rights *arguendo*).

While we are not at this stage prepared to describe in detail what materials may, consistent with the First Amendment, be covered by the regulations, we would like to conclude with some general observations. First, the legal difficulties in this context arise largely because of the profound constitutional hostility to prior restraints. If the regulations were cast, not as a licensing scheme, but as a form of subsequent punishment, they could cover a far broader range of conduct. Under *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), the government may punish speech that is both "directed to inciting or producing imminent lawless action" and "likely to . . . produce such action" (footnote omitted). Similar considerations may justify subsequent punishment for the export of technical data in circumstances in which the exporter knows or intends that the result will likely be harmful to the national security interests of the United States. In order to implement such a scheme of subsequent punishment, persons planning to "export" might be given an opportunity, but not required, to seek advice from the Secretary of Commerce as to whether the particular disclosure is prohibited by law.

Second, if a licensing system is to be retained, the constitutional prohibition against prior restraint suggests that it may be applied only to exports that are very likely to produce grave harm. *See New York Times Co.* v. *United States, supra.* Under this rationale it may be permissible to require a license before a person may disclose (with the requisite *scienter*) technical data having direct military applications to an adversary of the United States. Apart from this limited category, we believe that the prior restraint doctrine bars a licensing requirement.

As noted above, these comments are directed to the current version of your regulations. We will be pleased to provide further comments or assistance with respect to any future revisions.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Legislation Prohibiting Payment of Interest on Compensation Awards Under the 1980 Omnibus Territories Act

Congress may eliminate or modify claims which are purely statutory without violating the Fifth Amendment to the Constitution, unless those claims have ripened into final judgments. Thus, legislative repeal of a provision requiring payment of interest on compensation awards authorized by 48 U.S.C. § 1424c is constitutionally permissible, except insofar as it purports to affect cases in which an award of damages has become final.

July 29, 1981

MEMORANDUM OPINION FOR THE COUNSEL TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

This responds to your request for the views of this Office with respect to the constitutionality of proposed legislation prohibiting the payment of interest on compensation awards made under certain provisions of the 1980 Omnibus Territories Act, 48 U.S.C. § 1424c (Supp. IV 1980). For the reasons that follow, we believe that any such prohibition would be constitutional unless it were applied to final judgments awarded under § 1424c.

I. Background

In the latter stages of World War II and into the postwar years, the Department of Defense established certain military bases on the island of Guam. The land used for these bases was acquired from local landowners either through negotiated sale or through condemnation proceedings, generally conducted under military authority. *See* 123 Cong. Rec. 31073 (1977) (remarks of Rep. Burton); *Franquez* v. *United States,* 604 F.2d 1239 (9th Cir. 1979). Thereafter, some local landowners contended that the United States had treated them unfairly and thus deprived them of their right to just compensation under the Fifth Amendment.

The statutory provisions at issue here responded to these contentions. In 1977, Congress passed 48 U.S.C. § 1424c, which grants the district court of Guam jurisdiction

> to review claims of persons, their heirs or legatees, from whom interests in land on Guam were acquired other

> than through judicial condemnation proceedings, in which the issue of compensation was adjudicated in a contested trial in the District Court of Guam, by the United States between July 21, 1944, and August 23, 1963, and to award fair compensation in those cases where it is determined that less than fair market value was paid as a result of (1) duress, unfair influence, or other unconscionable actions, or (2) unfair, unjust, and inequitable actions of the United States.

Under these provisions, fair compensation is defined to include "such additional amounts as are necessary to effect payment of fair market value at the time of acquisition, if it is determined that, as a result of duress, unfair influence, or other unconscionable actions, fair market value was not paid." 48 U.S.C. § 1424c(c). Since the enactment of a 1980 amendment, Pub. L. No. 96-205, § 301, 94 Stat. 84, 87-88, this provision has required payment of interest on sums not paid.

II. Discussion

At the outset, we note that the rights created by 48 U.S.C. § 1424c are statutory in nature. If landowners in Guam have a constitutional claim to just compensation under the Fifth Amendment, and if just compensation must include interest payments, *see Shoshone Tribe of Indians* v. *United States,* 299 U.S. 476, 497 (1937), nothing in § 1424c bars an appropriate suit in the Court of Claims. The allowance of interest payments under the current provision does not affect the availability of such payments under the Just Compensation Clause; similarly, the disallowance of interest payments under a statutory amendment would not affect suits in which recovery was sought, not under the statute, but for a constitutional "taking." We do not believe that 48 U.S.C. § 1424c should be understood to preempt existing statutes that may provide remedies for constitutional takings.

In this light, the primary issue raised by your inquiry is whether, in cases in which the Fifth Amendment does not require compensation, legislative repeal of the allowance of interest by § 1424c would be constitutional. We believe that such a repeal would be permissible except to the extent that it purported to affect judgments that are final in the sense that a determination of damages and liability has been made and the time for the taking of an appeal has passed.

The general rule is that once an award of damages has become final, Congress may not constitutionally eliminate the liability of the United States under a final judgment. The rule was stated in *McCullough* v. *Virginia,* 172 U.S. 102, 123-24 (1898):

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate ac-

> tions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

In certain cases, of course, Congress may alter the remedies issued in a final judgment, but there is no authority for the proposition that Congress may eliminate a final judgment for monetary relief. The basic rule is stated in numerous cases. *See, e.g., Pennsylvania* v. *Wheeling and Belmont Bridge Co.,* 59 U.S. (18 How.) 421, 431 (1855) (allowing Congress to overturn final judgment requiring removal of bridge as obstruction to navigation, but stating "if the remedy in this case had been an action at law, and a judgment entered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress") (dictum); *Hodges* v. *Snyder,* 261 U.S. 600, 603–04 (1923), ("a suit brought for the enforcement of a public right . . . even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incidentally established by such judgment, *as for special damages to the plaintiff or for his costs,* it may not be thus taken away") (emphasis added); *Daylo* v. *Adminstrator of Veterans' Affairs,* 501 F.2d 811, 816 (D.C. Cir. 1974); *Comm'rs of Highways of Towns of Annawan, et al.* v. *United States,* 466 F. Supp. 745, 764–65 (N.D. Ill. 1979) ("It is clear that the River and Harbor Act of 1958 could not . . . interfere with plaintiffs' rights under the condemnation decrees"); *Battaglia* v. *General Motors Corp.,* 169 F.2d 254, 259 (2d Cir. 1948) (Congress may eliminate or modify claims, "so long as the claims, if they were purely statutory, had not ripened into final judgment").

In our view, these cases compel the conclusion that once an award under § 1424c has become final, the prevailing party has a "vested right" to them, and Congress may not remove that right without violating the Fifth Amendment. For this reason, we believe that any legislation insulating the government from liability under the Act may affect only those claims that have not been made subject of a final judgment. At the same time, the cases cited above stand for the proposition that, before final judgment has been entered, Congress may affect the relevant claims by eliminating the provision for payment of interest.

We understand that the claims to be litigated in district court in Guam will be subject to a bifurcated proceeding: an initial trial on damages, in which the verdict is solely advisory; and a subsequent trial on liability. If a claimant prevails at the liability stage, the determination of damages will become relevant, though it is subject to modification by the trial judge. Under this procedure, the award will not become final for Fifth Amendment purposes until the time for the taking of an appeal from the liability ruling has passed.

III. Conclusion

For the reasons stated above, Congress has the authority to eliminate interest payments on awards made under 48 U.S.C. § 1424c unless the right to such payments had become "vested" in the sense that it is the subject of a final judgment. In all other cases, Congress may modify § 1424c without violating the Fifth Amendment.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Status of the United States Postal Service as an "Executive Agency" Under Executive Order No. 12,250

In light of the statutory independence given the United States Postal Service (Service) and its officers, Executive Order No. 12,250 should not be construed to include the Service as an "Executive agency" subject to the Attorney General's nondiscrimination coordination authority.

July 29, 1981

MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

You have requested the views of this Office with respect to the question whether the United States Postal Service (Service) is an "Executive agency" within the meaning of Executive Order No. 12,250, 45 Fed. Reg. 72,995 (1980). For the reasons that follow, we believe that the order should not be construed to include the Postal Service as such an agency, notwithstanding the considerable authority of the President and the Attorney General over the litigating activities of the Service.

Under 42 U.S.C. § 2000d-1 and 20 U.S.C. § 1682, the President has been granted broad powers to approve the rules, regulations, and orders of general applicability relating to racial, sex, and other forms of discrimination. Executive Order No. 12,250 delegates these powers to the Attorney General. At the same time, the order grants the Attorney General authority to "coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions of" a variety of laws banning discrimination on grounds of race, color, national origin, handicap, religion, or sex. The Attorney General is required, for example, to develop standards and procedures for taking enforcement actions and conducting investigations; to promulgate guidelines for establishing time limits on enforcement activities; to implement a schedule for review of the agencies' regulations; to establish guidelines for development of consistent recordkeeping and reporting requirements and for sharing of information; and to initiate cooperative programs between and among agencies in order to improve the coordination of the covered laws. Under the order, each executive agency is required to cooperate with the Attorney General in performing its functions by furnishing requested information and submitting plans for the implementation of its responsibilities under the order. The order offers no definition of the "Executive agencies" that it covers.

This Office has recently discussed the "uneasy and unresolved tension between the dependent and independent aspects of the new [Postal] Service," *Leonard* v. *United States Postal Service*, 489 F.2d 814, 815 (1st Cir. 1974). *See* Memorandum of June 15, 1979, for the Assistant Attorney General, Civil Division, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel.[1] We summarize that discussion here. After passage of the Postal Reorganization Act of 1970 (Act), 39 U.S.C. § 101 *et seq.*, the Postal Service was categorized as "an independent establishment of the executive branch of the Government. . . ." 39 U.S.C. § 201. The Act provides for a bipartisan Board of Governors who are removable by the President only for cause. § 202(c). Moreover, the Postmaster General and the Deputy Postmaster General are appointed and removable, not by the President, but by the Board of Governors. § 202(c), (d).

An agency directed by a board of governors and by chief executive officers who are not freely removable by the President is not "within" the Executive Branch of the government as that term is ordinarily understood. After *Myers* v. *United States*, 272 U.S. 52 (1926), it is plain that purely executive officers must be appointed by the President, and removable at his will. Under the Act, by contrast, Congress did not intend Postal Service officials to have that status. The relevant committee report states that the Service was to be removed from the President's Cabinet and from the ordinary political process, *see* H.R. Rep. No. 1104, 91st Cong., 2d Sess. 6, 12–13 (1970), and that the Board was to act as a buffer between management of the Service and the possible influence of partisan politics. In this way, the statute was designed to remove "the day-to-day management of the Postal Service from both Presidential and Congressional areas of concern while still leaving the Postal Service subject to [their] broad policy guidance." *Id.* at 13.

For purposes of the present inquiry, we need not say whether the President possesses the constitutional or statutory authority to subject to the control of the Attorney General the activities of the Postal Service in the nondiscrimination area. There is a substantial argument that such control would constitute "broad policy guidance" of the sort permitted by the Act. The question here, however, is not one of presidential authority, but of the intent underlying the order.[2]

In light of the peculiar status of the Postal Service, we do not believe that the Service should be understood to be included as an "Executive agency" within the meaning of the order. The Service is not defined as such an agency under the Administrative Procedure Act, *see* 5 U.S.C.

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[1] In that memorandum, we concluded that, as a general matter, the Attorney General has the power to control litigation involving the Service.

[2] Nor need we say which of the statutes covered by the order is applicable to the Postal Service.

§§ 103–105. Moreover, both the Act and its history reveal that Congress intended to grant the Service at least some measure of insulation from control by the President and to place the Service in a separate category from the conventional executive departments. *See Leonard* v. *United States Postal Service,* 489 F.2d 814. In light of that unequivocal intent, we believe that, if the President intended to include the Postal Service under an executive order granting both substantive and procedural authority to the Attorney General, an explicit statement to that effect would ordinarily be expected.[3] Since Executive Order No. 12,250 contains no such explicit statement, but instead refers to "Executive agencies" generally, we interpret the order as not subjecting the Service to the Attorney General's coordination authority.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

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[3] We note in addition that in a memorandum on Executive Order No. 12,250 prepared before the order was signed or drafted in final form, this Office referred to the difficult legal problems that would arise if the order were applied to the so-called "independent" agencies. We have understood the failure to respond to this concern as an indication that the independent agencies were not intended to be included.

Proposed Interdiction of Haitian Flag Vessels

Proposed executive agreement between the government of Haiti and the United States, by which the U.S. Coast Guard is to stop and board Haitian flag vessels on the high seas in order to prevent Haitians from entering the United States illegally, is authorized both by the U.S. immigration laws, and by the President's inherent constitutional power to protect the Nation and to conduct foreign relations.

Authority for provision in proposed agreement with Haiti, by which the Coast Guard will detain Haitians emigrating in violation of Haitian law and return them to Haiti, derives from the President's statutory power to guard the borders against illegal entry of aliens, and from his inherent constitutional power in the field of foreign relations.

August 11, 1981

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your inquiry concerning the implementation of the proposed interdiction of Haitian flag vessels. As presently formulated, the government of Haiti and the United States will enter into an agreement (the Agreement) permitting the United States Coast Guard to stop Haitian flag vessels, board them and ascertain whether any of the Haitians aboard have left Haiti in violation of its travel laws and whether they intend to travel to the United States in violation of U.S. immigration laws. Individuals who are determined to have left Haiti illegally will be returned to Haiti pursuant to the President's authority in the field of foreign relations in order to assist Haiti in the enforcement of its emigration laws. Those who have left Haiti, whether legally or illegally, in an attempt to enter the United States illegally will be returned to Haiti pursuant to the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a)(1) to enforce U.S. immigration laws, to protect our sovereignty, and as an exercise of his power in the field of foreign relations.[1]

The Coast Guard plans to intercept the Haitian vessels in the Windward Passage, on the high seas but relatively close to Haiti.[2] At that point, Haitians will be headed toward either the United States or the Bahamas. Although experience suggests that two-thirds of the vessels are headed toward the United States, it is probable that, as the interdiction continues, an ever-increasing number will claim they are going to the Bahamas. Unless the Haitians admit they are coming to the United States, establishing their intended destination may become more difficult.

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[1] We note that the Agreement does not cover United States vessels either while they are in Haitian waters or while they are on the high seas. Therefore, the Agreement does not contemplate the return of the Haitians on board such vessels to Haiti.

[2] Placing the Coast Guard vessels closer to the United States is apparently not possible because of the increased difficulties and costs of detecting and interdicting vessels from Haiti once they have traveled far from Haiti and the practical problems of caring for the Haitians during the 4-day voyage back to Haiti.

1. *Effect of the Immigration and Nationality Act (INA).* The interdiction will not be affected by the provisions of the INA. Aliens are entitled to exclusion proceedings only when they arrive "by water or by air at any port within the United States." 8 U.S.C. § 1221(a). They are entitled to deportation proceedings only if they are "within the United States." 8 U.S.C. § 1251. Asylum claims may only be filed by those "physically present in the United States or at a land border or port of entry." The Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 105 (to be codified at 8 U.S.C. § 1158(a)). Since the interdiction will be taking place on the high seas, which is not part of the United States, 8 U.S.C. § 1101(a)(38), none of these provisions will apply.

2. *Coast Guard Authority to Enforce United States Laws.* The Coast Guard is authorized to stop ships upon the high seas in order to detect violations of American laws. 14 U.S.C. § 89(a).[3] The interdiction at seas of a foreign flag vessel requires the permission of the flag state, which the contemplated Agreement expressly grants.[4] The authority for returning the Haitians who are attempting to enter the United States illegally may be found in both statutory authority and implied constitutional authority under Article II. The two statutes are 8 U.S.C. §§ 1182(f) and 1185(a)(1). The first, 8 U.S.C. § 1182(f), states:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may

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[3] This section states:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas . . . for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

[4] The continuing jurisdiction of a country over vessels flying its flag on the high seas is a basic principle of international law. 1 L. Oppenheim, International Law § 264 (8th ed. 1955). This principle has been codified in the Convention on the High Seas, Apr. 29, 1958, art. 6, 13 U.S.T. 2313, T.I.A.S. No. 5200. Ships flying no flag may also be stopped to determine if they are stateless.

> by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.[5]

The second, 8 U.S.C. § 1185(a)(1), provides:

> (a) Until otherwise ordered by the President or Congress, it shall be unlawful—
>
> (1) for any alien to . . . attempt to . . . enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe . . .

Under § 1182(f), the President would make a finding that the entry of all Haitians without proper documentation is detrimental to the interests of the United States and issue a proclamation suspending their entry. It could be argued that the entry of illegal aliens, Haitians or otherwise, is already "suspended" since it is already illegal for them to come, and that the section is directed against those who are otherwise eligible. The section, however, is not limited by its terms to documented aliens, and the legislative history is silent on this point. Since the section delegates to the President the authority to exclude entirely certain classes of aliens, we believe that a return of the Haitians can be based on the Coast Guard's power to enforce federal laws. 14 U.S.C. § 89(a). Likewise, § 1185(a)(1) makes it unlawful for any alien to enter the country unless in compliance with the rules and limitations set by the President. All of the undocumented Haitians who are attempting to enter the country are therefore doing so in violation of this section. *See also* 8 U.S.C. § 1103 (Attorney General's duty to control and guard the borders); *Ex parte Siebold,* 100 U.S. 371, 396 (1879).[6]

Implied constitutional power is less clear. Where Congress has acted, the regulation of immigration is an area in which Congress exercises plenary power. *Kleindienst* v. *Mandel,* 408 U.S. 753, 766 (1972) (power to exclude aliens prevails over First Amendment interests of citizens). There has been recognition, however, that the sovereignty of the Nation, which is the basis of our ability to exclude all aliens, is lodged in both political branches of the government. *See Ekiu* v. *United States,* 142 U.S. 651, 659 (1892). An explicit discussion is found in *United States ex rel. Knauff* v. *Shaughnessy,* 338 U.S. 537 (1950). Rejecting a claim that it should review regulations which excluded a German war bride, the Court stated:

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[5] Neither this Office nor the Immigration and Naturalization Service (INS) is aware of any time when the power granted by this section, added in 1952, has been used.

[6] Given the desperate physical condition of many of the Haitians found on the high seas, the Coast Guard may, in particular situations, also be acting pursuant to its duty to render aid to distressed persons and vessels. 14 U.S.C. §§ 2, 88.

> Petitioner contends that the 1941 Act and the regulations thereunder are void to the extent that they contain unconstitutional delegations of legislative power. But there is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is *inherent in the executive power* to control the foreign affairs of the nation. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

Id. at 542 (citations omitted, emphasis added). *See also Savelis* v. *Vlachos*, 137 F. Supp. 389, 395 (E.D. Va. 1955) *aff'd*, 248 F.2d 729 (4th Cir. 1957) (dictum).

The President, in the exercise of this inherent authority, would be acting to protect the United States from massive illegal immigration. His power to protect the Nation or American citizens or property that are threatened, even where there is no express statute for him to execute, was recognized in *In re Neagle*, 135 U.S. 1, 63–67 (1890). *See also In re Debs*, 158 U.S. 564, 581 (1895); *United States ex rel. Martinez-Angosto* v. *Mason*, 344 F.2d 673, 688 (2d Cir. 1965) (Friendly, J. concurring); 50 U.S.C. § 1541 (War Powers Resolution).[7] A recent Supreme Court decision points out that, in the absence of legislation, it was a common perception that the President could control the issuance of passports to citizens, citing the foreign relations power. *Haig* v. *Agee*, 453 U.S. 281, 292–94 (1981).

The President may also act to return the boats with the flag state's permission as an exercise of his power in the field of foreign relations, a field in which "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). *See also Narenji* v. *Civiletti*, 617 F.2d 745, 747–48 (D.C. Cir. 1979), *cert denied*, 446 U.S. 957 (1980) (regulation of Iranian students); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) (regulation of foreign airlines). The President's power is strongest where he has well recognized constitutional powers (foreign affairs) to which Congress has added statutory delegation (8 U.S.C. §§ 1182 (f), 1185).

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[7] This Office has relied upon such inherent authority in an opinion, stating that the President could act to prevent airplane hijackings by placing marshals on board, even in the absence of express authority to take such preventive measures. Memorandum for the Director, United States Marshals Service, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, 2–3 (Sept. 30, 1970).

3. *Coast Guard Authority to Enforce Haitian Law Pursuant to an Agreement Entered into by the Executive.* The Coast Guard has submitted a draft Agreement that would permit the Coast Guard to board Haitian vessels in order to determine whether any alien is committing an offense against Haitian emigration laws. The issue which arises is whether the Executive can enter into an agreement under which the United States agrees to detain Haitians who are emigrating in violation of Haitian law in order to return them to Haiti. The President's authority to enter into executive agreements with foreign nations may be exercised either under congressional authorization or the President's inherent authority.[8] The President's power to enter into such agreements on his own authority can arise from "that control of foreign relations which the Constitution vests in the President as a part of the Executive function," 39 Op. Att'y Gen. 484, 486 (1940).[9] The limits on presidential power to enter into these agreements are not settled and have aroused controversy from the earliest days of our Republic.[10]

We believe that authority to enter into the Agreement is provided by two sources—the power delegated by Congress to the President, through the Attorney General, to guard the borders, 8 U.S.C. § 1103(a), and the President's authority in the field of foreign relations. The arrest of Haitian citizens as an aid to Haiti's enforcement of its emigration laws will enable the President to curtail the flow of Haitians in the furtherance of his "power and duty to control and guard the boundaries and the borders of the United States against the illegal entry of aliens." *Id.* The breadth of the President's authority in the field of foreign relations is extremely broad, as illustrated by the numerous executive agreements that have been negotiated and upheld by the courts.[11] *See United States* v. *Pink,* 315 U.S. 203 (1942) (Litvinov Agreement); *United States* v. *Belmont,* 301 U.S. 324 (1937) (same); *Tucker* v. *Alexandroff,* 183 U.S. 424, 435 (1902) (Mexican/United States agreement to permit both countries to cross the border in pursuit of marauding Indians);[12] *Dole* v. *Carter,* 444 F. Supp. 1065, 1068–69 (D. Kansas), *motion denied,* 569 F.2d 1109 (10th Cir. 1977) (return of the Crown of St. Stephen).

An agreement to aid the enforcement of the laws of another country is not without precedent. In 1891, the United States and Great Britain entered into an executive agreement prohibiting for one year the killing of seals in the Bering Sea. *Modus Vivendi Respecting the Fur-Seal Fisheries in Behring Sea,* 1 W. Malloy, Treaties, Conventions, International

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[8] E. Corwin, The President's Control of Foreign Relations 116–17 (1917) (Corwin).

[9] Agreements executed by various Presidents for the settlement of claims of United States citizens against foreign governments are examples. *See Dames & Moore* v. *Regan,* 453 U.S. 654 (1981).

[10] E. Corwin, The President, 216–233 (3d ed. 1948) (debate between Hamilton and Madison over the constitutionality of Washington's Proclamation of Neutrality); L. Henkin, Foreign Affairs and the Constitution 177 (1972) (Henkin).

[11] Henkin, *supra,* at 179.

[12] 1 W. Malloy, Treaties, Conventions, International Acts, Protocols, and Agreements 1144 (1910) (Malloy).

Acts, Protocols, and Agreements, 743 (1910) (Malloy). This agreement permitted the seizure of offending vessels and persons if "outside the ordinary territorial limits of the United States," by the naval authorities of either country. *Id.,* Art. III. "They shall be handed over as soon as practicable to the authorities of the nation to which they respectively belong. . . ." *Id.* As there was no statutory authority for this agreement, the President acted pursuant to his inherent authority in the field of foreign affairs.

Between 1905 and 1911, Presidents Roosevelt and Taft entered into a series of executive agreements that permitted the United States to operate the customs administration of both Santo Domingo (now the Dominican Republic) and Liberia.[13]

> [This first agreement] provided, in brief, for (1) a receiver of 'the revenues of all the customs houses,' to be designated by the President of the United States and satisfactory to the Dominican President; (2) the deposit in a New York bank for the benefit of creditors of all receipts above 45 percent, which was to be turned over to the Dominican Republic for the expenses of government administration and the necessary expenses of collection; and (3) the eventual distribution of the funds in the payment of Dominican debts.

W. McClure, International Executive Agreements 94 (1941). A customs administration in Haiti was established by treaty in 1915 but an elaborate series of executive agreements were signed "both extending and terminating various phases of American intervention and assistance in the financial, medical and military affairs of Haiti."[14]

Many authorities have noted that a President's exercise of his authority in this area is "a problem of practical statemanship rather than of Constitutional Law." E. Corwin, The President's Control of Foreign Relations 120–21 (1917).[15] The Supreme Court has upheld a variety of executive agreements based upon a number of theories and it is difficult to delineate with certainty the limits of the President's authority when he enters into such agreements based solely on his inherent executive authority. ***But see Reid*** **v.** ***Covert,*** 354 U.S. 1, 16–19 (1957) (agreement cannot deny civilian his right to a trial by jury). Because this Agreement will be based both on delegated and inherent authority, we believe that it is constitutional.

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[13] 1 W. Malloy, *supra,* at 418. *See also* McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements,* 54 Yale L.J. 181, 279 (1945); N. Small, Some Presidential Interpretations of the Presidency, 78–79 (1970). The arrangement was based on a fear that these countries' debts would be used by European countries as a grounds for military intervention.

[14] McDougal, *supra,* 54 Yale L.J. at 279. The final one was signed in 1934.

[15] Commitment of financial resources overseas "depend[s] directly and immediately on appropriations from Congress. . . . While the issue of Presidential power to make executive agreements or commitments has no legal solution, political forces have mitigated its theoretical rigors. The President has to get along with Congress and with the Senate in particular, and he will not lightly risk antagonizing it by disregarding what it believes are its constitutional prerogatives." Henkin, *supra,* at 183–84. *See also* K. Holloway, Modern Trends in Treaty Law 216–17 (1967); McClure, *supra,* at 330; Restatement (Second) of the Foreign Relations Law of the United States § 121 (1965).

4. *Obligations Under the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, United Nations, Protocol, 19 U.S.T. 6223,* T.I.A.S. No. 6577. Article 33 (19 U.S.T. 6276) of the Protocol, to which the United States is a party, provides that "No Contracting State shall . . . return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Individuals who claim that they will be persecuted for one of these reasons must be given an opportunity to substantiate their claims. The Protocol does not, however, mandate any particular kind of procedure. We have reviewed the plan outlined in the draft prepared by INS and believe that it comports with the Protocol.

5. *Effect of the Foreign Assistance Act of 1961, 22 U.S.C. § 2151–2151d (Supp. III 1979).* We know of no provision of the Act that would prohibit the interdiction, since no foreign aid funds are being used.

6. *Formal Implementation of the Interdiction.* There are three formal steps still to be taken before the interdiction can begin. The first is clearance of the Agreement by the Department of State. The second is the signing of the Agreement by the United States and the government of Haiti.[16] The third is the issuance of a proclamation by the President pursuant to 8 U.S.C § 1182(f). The proclamation would contain a finding that the entry of Haitian nationals who do not possess proper documentation for entry into the United States is detrimental to the interests of the United States. The proclamation would then suspend the entry of all such Haitian nationals. If a decision is made not to rely upon 8 U.S.C. § 1182(f), no proclamation is necessary. However, the validity of the President's action will certainly be strengthened by relying on both statutory provisions which provide support for the contemplated action.

The Coast Guard is presently under the authority of the Department of Transportation. 14 U.S.C. § 1. The Attorney General is in charge of enforcing the immigration laws. 8 U.S.C. § 1103. The Coast Guard will be enforcing both the immigration laws and the laws of Haiti pursuant to the Agreement. While a memorandum of understanding signed by the Coast Guard, INS, and the Department of State would facilitate operations, 14 U.S.C. § 141, a presidential order to the Secretary of Transportation to have the Coast Guard act to enforce both parts of the Agreement will avoid any question about the Coast Guard's authority to act.

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[16] The Agreement should be transmitted to Congress within 60 days. 1 U.S.C. § 112b(a) (Supp. III 1979).

7. *Coast Guard's Authority to Operate in Haitian Waters:* Under the Agreement Haiti will grant the Coast Guard permission to enter its waters to return Haitian nationals. The Coast Guard's authority to enter the waters will be pursuant to the Agreement.[17] By permitting the Coast Guard to enter its waters, Haiti is granting free passage to our ships and crews. Sovereign nations often grant permission for the passage of foreign forces. *Tucker* v. *Alexandroff,* 183 U.S. 424, 435 (1902); *Schooner Exchange* v. *McFaddon,* 11 U.S. 116, 139–40 (1812); 2 J. Moore, A Digest of International Law § 213 (1906). We suggest a modification to the Agreement to make it clear that Haiti will not exercise jurisdiction over the Coast Guard ships or her crews while they are in Haitian waters. *Schooner Exchange,* 11 U.S. at 140, 143.

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[17] It will not be pursuant to 14 U.S.C. § 89(a) because the waters of Haiti are not within the jurisdiction of the United States. *United States* v. *Conroy,* 589 F.2d 1258, 1265 (5th Cir. 1979). Section 89(a), however, does not limit the authority of the Coast Guard to act pursuant to another provision of law—in this case, the Agreement. 14 U.S.C. § 89(c).

Restrictions on Canadian Ownership of Federal Mineral Leases Under the Mineral Leasing Act of 1920

The provisions of 30 U.S.C. § 181, which bar ownership of leases under the Mineral Leasing Act of 1920 by citizens of a foreign country whenever the laws of that country deny "similar or like privileges" to U.S. citizens, reflect a reciprocity principle under which the United States would be able to respond in kind when another country restricts American investment in its minerals. Accordingly, the United States may take responsive steps "mirroring" Canadian restrictions on foreign investment in its mineral resources, so as to restore "similar or like privileges" between U.S. and Canadian citizens for purposes of § 181.

August 11, 1981

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION

You have informed us that the Administration is contemplating possible action responding to Canadian restrictions on foreign investment in its mineral resources. A principal legal question arising in this context is whether, consistent with 30 U.S.C. § 181, the United States may take responsive steps "mirroring" the Canadian restrictions on American investment in Canada by similarly restricting Canadian investment in American mineral resources, primarily by limiting Canadian ownership of federal mineral leases under the Mineral Leasing Act of 1920, 41 Stat. 437 (Act). Section 181 provides in pertinent part:

> Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this chapter.

It might be argued that whenever another country like Canada places restrictions on foreign ownership of interests in its mineral resources, § 181 permanently bars the citizens of the other country from owning any interest in any lease under the Act. Support for this inflexible interpretation might be sought in § 181's prohibition on ownership of "any interest in any lease" by the citizens of another country whose laws deny Americans "similar or like privileges."

We do not believe this to be the proper construction of § 181. Under that provision, the bar on "any" ownership of "any" lease under the Act does not apply unless "the laws, customs, or regulations" of another country "deny similar or like privileges to citizens or corporations of this country." The fact that another country takes steps to eliminate "similar or like privileges" does not, by itself, mean that this country would be barred from taking responsive action to restore "similar or like privileges" for purposes of § 181.[1] To read § 181 as preventing such responsive action would require the United States to adopt the rather draconian measure of cutting off all ownership interests of another country's citizens in federal mineral leases regardless how minimal the other country's restriction on foreign ownership of mineral resources may be, so long as the foreign restriction eliminated "similar or like" privileges. This interpretation disregards the apparent underlying purpose of § 181 to permit reciprocal relations between the United States and another country concerning ownership of each other's mineral resources.

Furthermore, the inflexible interpretation of § 181 disregards the principle that, under the Mineral Leasing Act, the Secretary of Interior has a "broad power" to manage federal mineral leases. *See Udall* v. *Tallman*, 380 U.S. 1, 4 (1965). Indeed, the Secretary is specifically delegated authority, *inter alia*, "to do any and all things necessary to carry out and accomplish the purposes of this chapter." 30 U.S.C. § 189. It seems plain that if another country were to eliminate "similar or like," responsive action to re-establish such a balance of privileges in a particular case may well effectuate the statute's purposes.

An interpretation of § 181 allowing "mirroring" action is consistent with the legislative history [2] and with what we understand to have been the Act's construction by the Department of the Interior, the agency charged with implementing it.[3] The sentence in § 181 dealing with "similar or like privileges" originated in the bill which became the Mineral Leasing Act of 1920 reported out by the House Committee on the Public Lands. The House Committee noted that its bill substituted language essentially identical to the present § 181 for a different Senate version [4] because, in its view, the Senate bill was too harsh and would be too likely to prompt retaliatory action by other countries:

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[1] All § 181 provides is that if another country does deny "similar or like privileges" to United States citizens, a bar on ownership of federal mineral leases takes effect. This leaves open the question whether, once another country takes such action, the United States may take responsive action restoring "similar or like privileges."

[2] *See United States* v. *American Trucking Ass'n*, 310 U.S. 534, 542–44 (1940) (for the principle that reliance on the purposes and history of a statute is appropriate in determining a statute's meaning).

[3] *See, e.g., Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 381 (1969) ("[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . ."); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1968) ("[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration"). An interpretation allowing "mirroring" responsive action is also consistent with the approach of 38 Op. Att'y Gen. 476 (1936), which concluded that England should be regarded as a country in a "reciprocal" relationship with the United States for purposes of the Mineral Leasing Act. The Attorney General, while noting that certain requirements governing foreign investment under British law had no exact parallels in American federal law, reasoned that these special British restrictions "are not unduly restrictive or harsh, " and some of them might even be matched in some state corporation statutes. Thus, the Attorney General, in adopting a practical approach to the statute's interpretation, refused to embrace the extreme view that any restriction in foreign law not matched in American law necessarily prompts application of an absolute bar on foreign ownership of mineral leases.

> *The House amendment to this clause seeks to avoid retaliatory action against American investors in foreign countries and provides that no citizen of any foreign country shall, by stock ownership, stock holdings, or stock control, own any interest in any lease acquired under the provisions of this act where such foreign country, by its laws, customs, or regulations, denies similar or like privileges to citizens or corporations of this country.* The main argument for the Senate draft was that foreign control of domestic corporations operating a lease under the act would result in large exportations of oil, coal, and other minerals covered by the act, and thereby deplete the domestic supply. Under the House reciprocal clause above mentioned it is obvious that the citizens of the United States could largely offset such a result by their own operations in foreign countries, or, if an acute situation ever developed, a general embargo against exportation would be a sufficient remedy.

H.R. Rep. No. 398, 66th Cong., 1st Sess. 11 (1919) (emphasis added). During floor debate on the House bill, its sponsor, Congressman Sinnott, engaged in the following colloquy with Congressman Snell:

> Mr. Snell: As I understand it, the British Government does not allow any alien to own any oil lands under the control of that Government. According to this act, what would be the result if a British subject owned stock in any one of our oil companies? What would be the situation in which he would find himself?
>
> Mr. Sinnott: *If the British Government discriminates against us, we meet that discrimination by denying to its citizens the rights that are withheld from us.*
>
> Mr. Snell: If I were a British subject and held some stock in one of these oil companies, would I be forced to sell it?
>
> Mr. Sinnott: The stock could be declared forfeited, under the forfeiture clause in the bill.
>
> Mr. Snell: *There is no protection then for any foreigner who happens to own stock in one of our oil companies, is there?*

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[4] The language in the Senate bill that was rejected by the House Committee had provided that "no alien shall . . . own any interests in a lease" under the Act "except with a specific provision in such lease authorizing the President, in his discretion, to take over and operate such lease, paying just compensation" to its owner, and provided further that "the Secretary of the Interior may require the sale for consumption in the United States of all or any portion of the products of any leased property in which it appears that any alien has an interest by stock ownership or otherwise." 58 Cong. Rec. 4160 (1919).

> Mr. Sinnott: *Not if his Government denies us the same rights.*

58 Cong. Rec. 7528 (1919) (emphasis added). Although the specific question posed above by Congressman Snell dealt with England, a country described as not allowing "any alien" to own "any oil lands," and thus presented an example of the type of case in which a flat ban would logically apply, Congressman Sinnott did not say that English citizens would be denied "any" rights to own federal mineral resources under the legislation. Rather, he explained that "we meet that discrimination [by a foreign nation] by denying to its citizens the rights that are withheld from us." This statement reflects a reciprocity principle under which the United States would be able to respond to another country's restrictive practices by "meeting" the other country's discrimination, in short, by responding in kind.

We also understand from conversations with legal staff of the Department of Interior that § 181 has not been read in the past as barring, and the Mineral Leasing Act as a whole has been read as authorizing, responsive "mirroring" action by the Secretary when another country restricts foreign investment in its mineral resources. For instance, we have been told that after Sweden and the Philippines placed restrictions on the percentages of permissible foreign ownership of their mineral resources, the Secretary imposed corresponding restrictions on the permissible percentages of Swedish and Philippine ownership of any corporation having a federal mineral lease. The courts have acknowledged that the interpretation of a statute by the agency charged with implementing it is entitled to some independent weight, barring contrary legislative language, purpose, or history. *See, e.g., Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969); *see also General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976). In this case, there is no such contrary indication regarding § 181 of which we are aware.

Conclusion

We conclude that the Mineral Leasing Act, including § 181, permits the Secretary to respond in kind when another country restricts American investment in its minerals.[5] In concrete terms, this principle would not appear difficult to apply in most cases, for instance in cases involving another country's restriction on the percentage of foreign ownership of corporations having interests in its mineral resources, or a restriction on any investment at all in a certain type of mineral covered by the Act. There may be other kinds of restrictions—for instance, changes in a foreign country's tax laws that would discourage investment in mineral resources by corporations having a certain percentage of foreign stockholders—that would be more difficult for the Secretary to "mirror," if only because the Secretary may lack authority to take the necessary "mirroring" action (*e.g.*, changing the tax laws of the United States in parallel fashion). In such cases, a question would arise whether other actions could be taken by the Secretary that would, in substance if not precisely in form, correspond sufficiently with the foreign nation's restrictions to permit the conclusion that "similar or like privileges" would be restored by such actions. Each situation must be approached on a case-by-case basis. However, we believe that the Secretary would be recognized by a reviewing court as having a reasonable degree of discretion in applying § 181 in a practical, flexible manner. *See* 38 Op. Att'y Gen. 476 (1936).[6]

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[5] We do not believe an equal protection argument could be successfully raised against this interpretation. Distinctions may be made on the basis of nationality by Congress or the Executive Branch so long as they rest on a sufficient rational foundation. *See, e.g., Narenji* v. *Civiletti,* 617 F.2d 745 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 957 (1980), and cases cited therein. Moreover, we do not believe that treaties in force would present a serious problem. It is our understanding that the Secretary would act only in cases in which a foreign power already had imposed restrictions of a similar kind. If there were an outstanding treaty of friendship, commerce, and navigation with the country of concern, the initial imposition of a restriction by our treaty partner would presumably be based on one of two possible assumptions: (1) that such action does not violate the treaty, in which case this country could act similarly without violating the treaty, or (2) that such action violates the treaty, in which case the breach by our treaty partner would leave us free to act reciprocally. *See* Vienna Convention on the Law of Treaties, S. Ex. L., 92d Cong., 1st Sess. (1971), Art. 60.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[6] This discussion has focussed on the application of § 181 to new mineral leases or changes in existing mineral leases. Additional issues would be raised if the Secretary sought to seek judicial cancellation of existing leases because of action by a foreign country denying "similar or like privileges" to American investors. We would be glad to provide advice in such situations should the occasion arise. *See generally* 30 U.S.C. §§ 184(h)(1) & 188(a); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981).

Disclosure of Information Collected Under the Export Administration Act

Information collected under the Export Administration Act which is authorized to be made available to other federal agencies under the Paperwork Reduction Act of 1980 may be released by the Department of Commerce to federal law enforcement and intelligence agencies without a prior determination that it would serve the national interest to do so.

Section 12(c) of the Export Administration Act was not intended to prohibit disclosure to other federal agencies, but merely prohibits disclosure of certain confidential trade information to the public.

Confidential information obtained pursuant to the Export Administration Act which is not covered by the Paperwork Reduction Act, and is exempt from disclosure under the Freedom of Information Act, may be released to federal law enforcement and intelligence agencies notwithstanding the prohibition in 18 U.S.C. § 1905, if the Secretary of Commerce determines under § 12(c) of the Export Administration Act that failure to make such disclosure would be contrary to the national interest.

In the exercise of his discretion under § 12(c), the Secretary of Commerce is subject to the review and direction of the President, and the President thus has the power, which he has previously exercised, to direct the Secretary to make a determination and authorize release of information.

August 24, 1981

MEMORANDUM OPINION FOR THE COUNSEL FOR INTELLIGENCE POLICY, DEPARTMENT OF JUSTICE

This responds to your request for our opinion whether the Export Administration Act precludes the Secretary of Commerce from making a general determination that the national interest would be served by the routine disclosure of information collected under the Act to law enforcement and intelligence agencies. You also asked whether the Export Administration Act would authorize an amendment to the regulations promulgated under the Act to define "export" to include the release of goods or technical data where the transferer "knows or has reason to know" that they will be shipped or transmitted from the United States to a foreign country. We addressed and resolved this question by our memorandum to the Department of Commerce of July 28, 1981, and a more extensive memorandum to the Department of State of July 1, 1981, copies of which we have enclosed for you. With respect to the first question, we have concluded that all information collected by the Department of Commerce under the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503, 50 U.S.C. App. §§ 2401-2420 (Supp. III 1979), which falls under the definition of "collection of information" set forth in the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, § 2(a) 94 Stat. 2812, 44 U.S.C. §§ 3501-3520 (Supp. IV 1980), may be released to other federal agencies, including law enforcement and intelligence agencies. With respect to other confidential information obtained pursuant to the Export Administration Act which is not covered by the Paperwork Reduction Act, we perceive no legal reason why the Secretary of Commerce cannot make a generalized determination that disclosure to federal law enforcement and intelligence agencies is in the national interest and waive the confidential treatment of the information to the extent of such a transfer.

I. Paperwork Reduction Act

Our analysis focuses initially on the Paperwork Reduction Act rather than on the question specifically raised by your request—whether information obtained under the Export Administration Act could be disclosed to federal law enforcement agencies upon a general determination by the Secretary of Commerce that such disclosure is in the national interest—because we believe that, with the enactment of the Paperwork Reduction Act after the submission of your opinion request, most of the information is authorized to be disclosed to other federal agencies without a national interest determination by the Secretary. With respect to information that may be shared under the Paperwork Reduction Act, the question of the need for a national interest determination arises only when a federal agency seeks to disclose confidential information obtained under the Export Administration Act to the public.

The Paperwork Reduction Act of 1980, which replaced the Federal Reports Act, Pub. L. No. 90-620, 82 Stat. 1302, provides:

> The Director [of Office of Management and Budget] may direct an agency to make available to another agency, or an agency may make available to another agency, information obtained pursuant to an information collection request if the disclosure is not inconsistent with any applicable law.

94 Stat. at 2822, 44 U.S.C. § 3510 (Supp. IV 1980). Thus, the Department of Commerce is authorized by the Paperwork Reduction Act to share information with other federal agencies, including law enforcement and intelligence agencies, when the following conditions are present:

1) The information is obtained pursuant to an information collection request; and

2) The disclosure of information is not inconsistent with any applicable law.

A. "Information Collection Request"

Under the Paperwork Reduction Act, an "information collection request" is defined as a "written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement or other similar method calling for the collection of information." 94 Stat. at 2814, 44 U.S.C. § 3502(ii). "Collection of information" is defined to include "the obtaining or soliciting of facts or opinions by any agency through the use of "any of the above-mentioned methods which calls for "answers to identical questions posed to, or identical reporting or record-keeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States. . . ." 94 Stat. at 2813, 44 U.S.C. § 3502(4).

Thus, information on identical license application forms or other reporting forms collected pursuant to the Export Administration Act, as well as information obtained by the Commerce Department in reviewing records maintained by exporters pursuant to identical recordkeeping requirements issued under the Act, fall within the definition of information obtained pursuant to an information collection request which may be shared with other federal agencies if such disclosure is not inconsistent with any applicable law.

B. "Not Inconsistent with any Applicable Law"

The legislative history of the Paperwork Reduction Act makes clear that in order for the disclosure of information to be "inconsistent with any applicable law,"

> the applicable law must prohibit the sharing of data between agencies or must totally prohibit the disclosure to anyone outside the agency. A mere prohibition on disclosure to the public would not be inconsistent with sharing the data with another agency unless the sharing would inexorably lead to a violation of that prohibition.

H.R. Rep. No. 835, 96th Cong., 2d Sess. 30 (1980). *See also* S. Rep. No. 930, 96th Cong., 2d Sess. 50 (1980).[1] Because the Export Administration Act contains a non-disclosure provision, it is necessary to determine whether that non-disclosure provision prohibits disclosure to other federal agencies or whether it is a "mere prohibition on disclosure to the public."

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[1] The Senate bill as reported by the Senate Committee on Governmental Affairs also excepted from the authorization for interagency sharing of information disclosures which are inconsistent with applicable agency policy. That exception was deleted by an amendment on the Senate floor. 126 Cong. Rec. S 14690 (daily ed. Nov. 19, 1980).

II. Section 12(c) of the Export Administration Act

The non-disclosure provision, § 12(c) of the Export Administration Act, 93 Stat. at 531, as codified at 50 U.S.C. App. § 2411(c),[2] separates the information obtained under the Act into two categories—information collected before and information collected after June 30, 1980. Section 12(c) provides that all information obtained under the Export Administration Act after June 30, 1980, except licensing information, may be withheld from public release only to the extent permitted by other law. Licensing information is to be withheld from public disclosure unless the Secretary of Commerce determines that the release of such information would be in the national interest. We think it is clear from the face of § 12(c) that all the information obtained under the Export Administration Act after June 30, 1980, including licensing information, may be shared with other federal agencies, assuming no other statutory bar, if it is information obtained under an "information collection request" as defined by the Paperwork Reduction Act. We draw this conclusion because the prohibition in § 12(c) against disclosure of such information, to the extent it prohibits disclosure, is directed solely at public disclosure.

With respect to information obtained prior to June 30, 1980, we also believe that the Paperwork Reduction Act authorizes disclosure of information obtained under an "information request" to other federal agencies because the prohibition in § 12(c) was intended to be a "mere prohibition against public disclosure." There is some ambiguity in § 12(c)'s treatment of information acquired before June 30, 1980, because, in addition to expressly exempting such information from disclosure under the Freedom of Information Act (FOIA), it goes on to provide that "such information shall not be published or disclosed unless the Secretary determines that the withholding thereof is contrary to the national interest." Although this restriction could be read as a blanket prohibition against disclosure of information obtained prior to June 30, 1980, to anyone outside of the Department of Commerce, our analysis of its legislative history reveals that this restriction was intended only to prevent any disclosure of such information to the public whether under the Freedom of Information Act or by a discretionary release.

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[2] (c) Confidentiality

(1) Except as otherwise provided by the third sentence of section 8(b)(2) [section 2407(b)(2) of this Appendix] and by section 11(c)(2)(C) of this Act [section 2410(c)(2)(C) of this Appendix], information obtained under this Act [sections 2401 to 2420 of this Appendix] on or before June 30, 1980, which is deemed confidential, including Shippers' Export Declarations, or with reference to which a request for confidential treatment is made by the person furnishing such information, shall be exempt from disclosure under section 552 of title 5, United States Code, and such information shall not be published or disclosed unless the Secretary determines that the withholding thereof is contrary to the national interest. Information obtained under this Act [sections 2401 to 2420 of this Appendix] after June 30, 1980, may be withheld only to the extent permitted by statute, except that information obtained for the purpose of consideration of, or concerning, license applications under this Act [sections 2401 to 2420 of this Appendix] shall be withheld from public disclosure unless the release of such information is determined by the Secretary to be in the national interest. Enactment of this subsection shall not affect any judicial proceeding commenced under section 552 of title 5, United States Code, to obtain access to boycott reports submitted prior to October 31, 1976, which was pending on May 15, 1979; but such proceeding shall be continued as if this Act [sections 2401 to 2420 of this Appendix] had not been enacted.

(2) Nothing in this Act [sections 2401 to 2420 of this Appendix] shall be construed as authorizing the withholding of information from the Congress, and all information obtained at any time under this Act [sections 2401 to 2420 of this Appendix] or previous Acts regarding the control of exports, including any report or license application required under this Act [sections 2401 to 2420 of this Appendix], shall be made available upon request to any committee or subcommittee of Congress of appropriate jurisdiction. No such committee or subcommittee shall disclose any information obtained under this Act [sections 2401 to 2420 of this Appendix] or previous Acts regarding the control of exports which is submitted on a confidential basis unless the full committee determines that the withholding thereof is contrary to the national interest.

50 U.S.C. App. § 2411(c).

From the legislative history of § 12(c), it is apparent that the impetus for amending the non-disclosure provision came from a court of appeals decision that information obtained under the Export Administration Act was not specifically exempted from disclosure for the purpose of the Exemption 3 of the Freedom of Information Act, 5 U.S.C. § 552(b)(3), and that such information must be publicly disclosed unless it qualified under another FOIA exemption. *See American Jewish Congress* v. *Kreps,* 574 F.2d 624. (D.C. Cir. 1978). The Senate Banking, Housing, and Urban Affairs Committee responded to this decision by exempting all information obtained under the Act from disclosure, stating

> [t]he Committee does not believe it is in the public interest to require the disclosure to foreign and domestic competitors of U.S. firms such information as the precise value, nature, parties to the transaction and shipping date of exports by such firms, where the sole reason such information is provided to the United States government is that the information is required by statute in order to receive an export license.

S. Rep. No. 169, 96th Cong., 1st Sess. 17 (1979).

The House bill, reported by the House Commitee on Foreign Affairs, differed from the Senate bill in that it accorded only certain types of information obtained under the Act protection from disclosure under the Freedom of Information Act. Like the Senate report, the House report expressed concern solely with *public* disclosure of the information obtained under the Act. H.R. Rep. No. 200, 96th Cong., 1st Sess. 11, 28 (1979).

After extensive debate on the House floor, that body adopted an amendment to § 12(c) which gave different treatment to the information obtained before June 30, 1980, from that obtained after June 30, 1980. Throughout the debate, it is clear that the purpose of giving confidential treatment to certain information obtained under the Act, whether by the approach adopted by the House committee bill or by the amendment with the June 30, 1980, cutoff date, was to protect American businesses from disclosure of sensitive financial and marketing information to their competitors:

> Mr. Fascell: Mr. Chairman, one of the problems and the reason for the date (June 30, 1980) is that the information asks names of customers and prices of goods which is and should be trade secrets. That is the problem and that is the reason for the cutoff.

125 Cong. Rec. 25,636 (1979).

> Mr. Alexander: Mr. Chairman, it is important that exporters be allowed confidentiality on their SED's (Shipper Export Declarations). The data disclosed on SED's includes confidential business information in which disclosure to competitors would be harmful. Foreign competitors would be especially benefited because they would not have similar vulnerabilities.

Id. at 25,637.

> Mr. Lagomarsino: The information, if published would enable foreign and domestic competitors to gain significant advantages in the same markets. It has always been public policy to insure confidentiality of competitive business information. . . .
>
> If the government requires business to supply confidential information, then government should provide protection for that information.

Id. at 25,639.

The Senate adopted an amendment with the June 30, 1980, cutoff with little debate, but the statement of Senator Hatch, who introduced the amendment, reveals that the purpose of the cutoff date was to protect information already submitted to the Commerce Department from public disclosure and to give American businesses a period to adjust to the public disclosure of the information (except licensing information) submitted after the cutoff date:

> Mr. Hatch: Mr. President, I am introducing an amendment to delete the indefinite blanket exemption to the Freedom of Information Act requests and replace it with an exemption until June 30, 1980. This will give exporters almost a year's time to prepare for a change in the law at that time, which would result in all export control information being subject to the Freedom of Information Act except for license applications. These license applications are the items that exporters are most concerned about

> becoming available to their competitors, plus they contain sensitive national security information.

Id. at 20,012–13.

On the basis of the language of § 12(c) as explained by its legislative history, it is our view that § 12(c) was not intended to prohibit disclosure to other federal agencies and that, to the extent it prohibits disclosure at all, it is merely a prohibition against *public* disclosure. We conclude, therefore, that disclosure to federal law enforcement and intelligence agencies of information obtained pursuant to an information "collection request" is authorized by the Paperwork Reduction Act of 1980, if not otherwise prohibited by another statute.[3]

That authorization does not, however, necessarily permit federal law enforcement and intelligence agencies to disclose such information to the public because the Paperwork Reduction Act[4] subjects those agencies to the same restrictions on public release which bind the Department of Commerce. Thus, before releasing to the public information obtained under the Export Administration Act prior to June 30, 1980, and licensing information obtained after June 30, 1980, it may be necessary, in the absence of an overriding authorization for such release, to obtain a determination by the Secretary of Commerce that such a release would be in the national interest. If there are certain classes of information the release of which to the public would be in the national interest, we perceive no statutory bar to the Secretary's making such a general determination and thus removing any § 12(c) restrictions on public release.

III. Information Not Covered by the Paperwork Reduction Act

With respect to any information obtained under the Export Administration Act which is not regulated by the Paperwork Reduction Act, we believe that any information that is available to the public because it is not exempt from disclosure under the Freedom of Information Act should also be available to other federal agencies. For information that is not available to the public, either because it is licensing information obtained prior to June 30, 1980, or information acquired after June 30, 1980, which qualifies for another FOIA exemption, a more difficult question arises whether the information may be disclosed to federal law enforcement and intelligence agencies. The fact that § 12(c) does not prohibit disclosures to other federal agencies may not necessarily mean that interagency disclosure of non-public information not covered by the Paperwork Reduction Act is authorized.

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[3] For example, if the information concerns individuals and is contained in a system of records, disclosure to law enforcement agencies may be prohibited by the Privacy Act, 5 U.S.C. § 552a, unless such disclosure qualifies for and has been published as routine use or unless the head of the law enforcement agency submits a written request to the Department of Commerce specifying the particular portion of a record desired and the law enforcement activity for which the record is sought.

We do not agree with the Department of Commerce that 18 U.S.C. § 1905, which prohibits the disclosure of confidential trade information unless authorized by law, would bar interagency disclosure because, assuming no other statutory prohibition against disclosure, § 3510 of the Paperwork Reduction Act would authorize the disclosure. 44 U.S.C. § 3510.

[4] The Paperwork Reduction Act provides:

> If information obtained by an agency is released by that agency to another agency, all the provisions of law (including penalties which relate to the unlawful disclosure of information) apply to the officers and employees of the agency to which information is released to the same extent and in the same manner as the provisions apply to the officers and employees of the agency which originally obtained the information. The officers and employees of the agency to which the information is released, in addition, shall be subject to the same provisions of law, including penalties, relating to the unlawful disclosure of information as if the information had been collected directly by that agency.

94 Stat. at 2822, 44 U.S.C. § 3510 (Supp. IV 1980).

The existence of an affirmative authorization in the Paperwork Reduction Act for certain information arguably implies that some authorization is required, whether by statute, either expressly or by necessary implication, or by substantive regulation. Moreover, it may be necessary to determine whether there is an authorization for disclosure to federal law enforcement and intelligence agencies to avoid the strictures of 18 U.S.C. § 1905. Section 1905 [5] requires that any disclosure by federal employees of trade secrets or confidential business be "authorized by law." [6] The phrase "authorized by law" does not mean that the authorization must be "specifically authorized by law"; it is sufficient that the disclosure is "authorized in a general way by law." 41 Op. Att' Gen. 166, 169 (1953). The following have been recognized as lawful sources of disclosure authority under § 1905 or its predecessors: subpoenas (*Blair* v. *Oesterlein Machine Co.*, 275 U.S. 220, 227 (1927), *United States* v. *Liebert*, 519 F.2d 542, 546 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975)); requests of congressional committees acting within the limits of their jurisdiction and authority (41 Op. Att'y Gen. 221 (1955)); substantive regulations, provided that the authority on which the regulation is based includes, either expressly or by necessary implication, the power to waive the confidentiality of the information (*Cf. Chrysler Corp.* v.

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[5] Section 1905 reads:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.
>
> 18 U.S.C. § 1905.

[6] The question whether 18 U.S.C. § 1905 applies to intragovernmental transfers of information has never been resolved. As is evident from the inclusiveness of the words of the statute, a literal reading of its provisions would seem to prohibit interagency disclosures. Opinions construing § 1905 and its predecessor statutes have avoided resolution of the scope of § 1905 by finding legal authorization for the disclosure sought. 31 Op. Att'y Gen. 541 (1919); 41 Op. Att'y Gen. 221 (1955).

Brown, 441 U.S. 281, 294–316 (1979)); or necessary statutory implication (41 Op. Att'y Gen. 106 (1953)).

It is unnecessary, however, to decide the question whether an independent authorization for disclosure to federal law enforcement and intelligence agencies is required because the Secretary of Commerce could under § 12(c) authorize disclosure to federal law enforcement and intelligence agencies by determining that failure to make such disclosures would be contrary to the national interest. We believe that the authority to permit such interagency disclosure is necessarily included in the greater power to disclose information publicly upon a national interest determination. As discussed above, we perceive no statutory bar to making such a determination, for a general class of information or on some other generalized basis. In the exercise of his discretion to make a national interest determination under § 12(c) to release information, the Secretary of Commerce is, of course, subject to the review and direction of the President. *Congress Construction Corp.* v. *United States,* 314 F.2d 527, 530–31 (Ct. Cl.) *cert. denied,* 375 U.S. 817 (1963); 7 Op. Att'y Gen. 453, 469–70 (1855). Thus, the President has the power, which President Carter exercised during his Administration, to direct the Secretary to make such a determination and authorize release of information obtained under the Export Administration Act to law enforcement and intelligence agencies on a routine basis if the President determines it would be contrary to the national interest to withhold such information from those agencies.

LARRY L. SIMMS
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Office of Legal Counsel

Status of Persons Who Emigrate for Economic Reasons Under the Refugee Act of 1980

Under the Refugee Act of 1980, a "refugee" is defined as a victim of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion; economic hardship by itself is not a basis for eligibility as a refugee under the Act.

Refugee status under the Refugee Act of 1980 should normally be considered on an individual basis. While the Immigration and Naturalization Service may apply commonly known circumstances to people falling within particular groups without requiring the facts necessary to determine eligiblity to be proved individually in each and every case, group determinations should generally be reserved for situations in which the need to provide assistance is extremely urgent and political reasons preclude an individual determination of status.

Fear of prosecution for departing a country in violation of its travel laws is not sufficient to entitle an individual to refugee status, unless it can be shown that such prosecution would be motivated by one of the proscribed reasons. If the country treats departure as a political act and punishes that act in a harsh and oppressive manner, such circumstances would qualify as "persecution on account of . . . political opinion" under the Act.

August 24, 1981

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE

This responds to your request for our views on the memorandum prepared by your Office titled "Processing of Refugees of Special Humanitarian Concern," dated June 25, 1981 (Memorandum). We generally agree with the conclusions set forth in that Memorandum, but add the following comments regarding whether persons who leave a country for economic reasons may be considered refugees under the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (Act) because they are threatened with harsh treatment upon return to their country. The answer to this question depends on what constitutes a refugee under the Act.

The Act created a new category of aliens called "refugee[s]." Under the existing law prior to the adoption of the Act, admission was limited to "conditional entrants" who were fleeing from persecution "on account of race, religion, or political opinion" in the Middle East or a Communist country *or* who had been "uprooted by catastrophic natural calamity." 8 U.S.C. § 1153(e)(7)(Supp. III 1979). Ending these geographic and ideological limits was one of the major reforms intended by the Act. The comments of Representative Holtzman, chairwoman of the House subcommittee in charge of the bill, are typical: "The new definition . . . will give our Government the flexibility to deal with crises such as the evacuation of Vietnam in 1975 and to respond as well to situations in countries such as Cuba or Chile today where there are political detainees or prisoners of conscience." 126 Cong. Rec. 4499 (1980).

As a result, the status of "conditional entrant" was eliminated and that of "refugee" was created. Section 201(a) of the Act, (to be codified at 8 U.S.C. § 1101(a)(42)), defines a refugee as

> any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

The expansion of the definition to eliminate ideological and geographical restrictions was intended to conform our law to the definition found in the United Nations Convention and Protocol Relating to the Status of Refugees (Convention), Jan. 31, 1967, 19 U.S.T. 6223, 6259 T.I.A.S. No. 6577.[1]

> [T]he new definition will bring United States law into conformity with our international treaty obligations under the United Nations Protocol Relating to the Status of Refugees which the United States ratified in November 1968, and the United Nations Convention Relating to the Status of Refugees which is incorporated by reference into United States law through the Protocol.

S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979). *See also* S. Rep. No. 590, 96th Cong., 2d Sess. 19 (1980); H.R. Rep. No. 781, 96th Cong., 2d Sess. 19 (1980); H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979); 126 Cong. Rec. 23,232 (1979) (remarks of Sen. Kennedy, floor manager); *id.* at 4499, 4503 (1980); *id.* at 3757 (1980). It was not intended to require us to accept for admission the millions of individuals who might qualify as refugees. H.R. Rep. No. 608, *supra,* at 10; 126 Cong. Rec. 23,232 (1979); *id.* at 4507 (1980). Instead, a cap of 50,000 was placed on annual admissions through 1982. Act, § 207(a)(1) to be codified at 8 U.S.C. § 1157(a)(1).[2] Further, all refugee admissions must "be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation [with Congress]." *Id.*, § 207(a)(3), to be codified at 8 U.S.C. § 1157(a)(3). *See also id.*, § 207 (b), (c)(1) to be codified at 8 U.S.C. § 1157, (b), (c)(1).

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[1] The exception contained in the prior law for victims of natural calamities—who are likely to become economic migrants—was eliminated.

[2] After 1982, the President will set the limit. In an emergency situation, the President may now, after consultation with Congress, admit a fixed number of additional refugees. Act, § 207(b), to be codified at 8 U.S.C. § 1157(b).

There are three aids that can be used to determine whether Congress intended to allow purely economic migrants to claim refugee status under the Act.[3] First is the legislative history of the Protocol when it was ratified by the Senate in 1968, thereby automatically adopting the Convention. Second is the U.N.'s interpretation of the Convention. Third is the courts' interpretations over the years of 8 U.S.C. § 1253(h).

A basic rule of statutory construction is that a statute based upon another statute, even that of a foreign state, "generally is presumed to be adopted with the construction which it has received." *James* v. *Appel*, 192 U.S. 129, 135 (1904).[4] In 1979, the United Nations High Commissioner for Refugees (UNHCR) issued a nonbinding guide to aid the Convention's signatory states in determining whether someone was a refugee. Handbook on Procedures and Criteria for Determining Refugee Status Under the Convention and Protocol (Handbook). We assume that Congress was aware of the criteria articulated in the Handbook when it passed the Act in 1980, and that it is appropriate to consider the guidelines in the Handbook as an aid to the construction of the Act.[5]

A second relevant rule of statutory construction is that provisions of a statute that are repeated in an amendment to the statute, either in the same or equivalent words, are considered a continuation of the original law. 1A Sands, Sutherland on Statutory Construction § 22.33 (4th ed. 1972) (Sands). "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978).

Prior to its amendment in 1980, 8 U.S.C. § 1253(h) authorized the Attorney General to suspend the deportation of any alien who "would be subject to persecution on account of race, religion or political opinion."[6] Numerous cases have discussed the meaning of "persecution on account of . . . political opinion." Section 203(e) of the Act added "nationality" and "membership in a particular social group," so that

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[3] The legislative history of the Act contains no aid to interpretation beyond repeated statements that it is adopting the Convention's definition of "refugee."

[4] *See also Willis* v. *Eastern Trust & Banking Co.*, 169 U.S. 295, 307–08 (1898); *Cathcart* v. *Robinson*, 30 U.S. (5 Pet.) 264, 280 (1831); *Roberto* v. *Aguon*, 519 F.2d 754, 755 (9th Cir. 1975); *Chauffeurs, Local Union No. 364* v. *Ruan Transport Corp.*, 473 F. Supp. 298, 302–03 (N.D. Ind. 1979).

[5] The guidelines from the Handbook are just that—guidelines. They may be accepted or rejected with respect to a signatory state's interpretation of the Convention, and, more importantly, with respect to your interpretation of the Act.

[6] Prior to 1965, the section referred only to "physical persecution." 8 U.S.C. § 1253(h) (1964).

§ 1253(h) now tracks the definition of "refugee" found in § 1101(a)(42). These two provisions should be construed together. 2A Sands, *supra*, § 51.02. The earlier cases remain relevant, therefore, for a discussion of persecution based on political opinion.

We believe that the definition of "refugee" is limited by both its plain language and these interpretive aids to those who are victims of persecution based on one of the five bases named: race, religion, nationality, membership in a particular social group, or political opinion. Political persecution may take the form of economic reprisals, such as denying individuals the opportunity to work.[7] Likewise, an individual suffering economic hardship may also become the victim of political persecution because of political upheavals. Economic hardship itself, however, is not a basis for eligibility as a refugee under the Act. This interpretation is supported by all the sources consulted. *See, e.g.*, S. Ex. Rep. No. 14, 90th Cong., 2d Sess. 13 (1968). Economic migrants, who are moved "exclusively" by economic conditions, are not refugees. Handbook, ¶ 62. *See also Cheng Kai Fu* v. *INS*, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968) ("[P]hysical hardship or economic difficulties . . . shared by many others . . . do not amount to . . . particularized persecution.")

The Bureau for Refugee Programs has argued that all persons who leave Laos, Kampuchea, and Vietnam are, regardless of their motivation for leaving, treated as political opponents on their return and will probably suffer political persecution.[8] The Bureau "contends that there is no need to examine individual cases, as blanket refugee status for all these [refugees] is mandated. . . . The act of leaving will be all that is necessary to become a refugee." Memorandum, at 6. You have expressed disagreement with this position, on both legal and policy grounds. Memorandum, at 5–9. We agree with you that applications for refugee status should be considered on an individual basis, but suggest that the law allows considerable discretion in means by which these determinations are made and certainly does not foreclose your application of commonly known circumstances to people falling within particular groups. For example, where it has been shown to your satisfaction that a particular country persecutes all individuals with particular political views, it would not seem necessary for you to require that fact to be proved individually in each and every case.

We also concur with you that the "act of leaving" in and of itself is not alone sufficient to entitle an individual to refugee status. Nor do we feel that the fact of prosecution for the violation of a nation's travel laws rises to the level of "persecution on account of . . . political opinion." However, systematic and harsh punishment for the act of leaving a country may, in some circumstances, meet this standard. Whether a particular situation meets this standard is largely a factual matter which must be determined in individual situations depending upon the extent to which a country punishes those who attempt to leave.

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[7] "The denial of an opportunity to earn a livelihood in a country such as the one involved here is the equivalent of a sentence to death by means of slow starvation and none the less final because it is gradual." *Dunat* v. *Hurney*, 297 F.2d 744, 746 (3d Cir. 1961). *See also Soric* v. *Flagg*, 303 F.2d 289, 290 (7th Cir. 1962); Handbook, ¶ 63.

[8] Letter from the Acting Director, Bureau for Refugee Programs, to the Acting Commissioner, Immigration and Naturalization Service, Feb. 27, 1981.

This latter conclusion is reflected in the source material. Our courts, the U.N., and the Immigration and Naturalization Service (INS) have recognized that the threat of prosecution for violations of travel laws does not in itself constitute persecution.[9] It is when the prosecution is politically motivated that the courts have said they will intervene. *Berdo* v. *INS,* 432 F.2d 824, 845–47 (6th Cir. 1970); *Kovac* v. *INS,* 407 F.2d 102, 104–05 (9th Cir. 1969); *Kalatjis* v. *Rosenberg,* 305 F.2d 249, 252 (9th Cir. 1962); *In re Nagy,* 11 I. & N. Dec. 888, 891–92 (1966); Handbook, ¶ 61.[10] If individuals leave a country for economic reasons, their behavior may be condemned by their country, but their disagreement with the state is presumably based on economics, not politics. Prosecution for violation of the state's travel laws when they return is not persecution unless the laws are applied for one of the proscribed reasons. *In re Chumpitazi,* 16 I. & N. Dec. 629, 633–34 (1978); *In re Janus and Janek,* 12 I. & N. Dec. 866, 876 (1968); Handbook, ¶ 61. Once the alien has proved that the laws are being applied for a proscribed reason, however, he is eligible to be recognized as a refugee. If the country treats the departure as a political act and punishes that act in a harsh and oppressive manner, we believe that such circumstances fall within the definition of the Act. *Henry* v. *INS,* 552 F.2d 130, 131 (5th Cir. 1977) (Petitioners alleged that "anyone who had fled the regime [in Haiti], would be received with hostility by the present government. If proved, such an allegation might form a sound basis for fear of persecution regardless of the placidity of an individual's political past.")

You have questioned whether this is a proper interpretation because "a foreign government could in effect create 'political' opponents for opportunistic reasons" by simply declaring that citizens who leave will be deemed to be political opponents. However, we believe that such a declaration would not be sufficient proof that an individual had a well-founded fear that he would be persecuted on his return. Issues of fact cannot be resolved in the absence of information about factors such as whether the government is really enforcing the policy, whether the policy is being applied against all returnees or just some, whether the policy involves application of longstanding domestic travel laws or new restrictions, and whether it is likely that the alien's departure and subsequent return will be noticed by his country. *Compare Fleurinor* v. *INS,* 585 F.2d 129, 132–33 (5th Cir. 1978) *with Coriolan* v. *INS,* 559 F.2d 993, 1002–04 (5th Cir. 1977). As the drafters of the Convention said, the definition of refugee is meant to cover a person who "has either been actually a victim of persecution or can show good reason why he fears persecution," U.N. Doc. E/1618 and Corr. 1, at 11 (1950), and the signatory state is the ultimate judge of the validity of that fear. Moreover, as noted earlier, the law does not require the United States to accept an individual even if he does qualify as a refugee. Act, § 207(a)(3), (b), (c)(1).[11]

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[9] West Germany and Austria have adopted a somewhat broader interpretation. Prosecution for leaving certain countries will be deemed to be persecution *if* the alien left because of his political opinions. Memorandum to UNHCR Branch Office for the United States, from Director of Protection, Jan. 21, 1981, ¶¶ 27–29, 32.

[10] In *Sovich* v. *Esperdy,* 319 F.2d 21, 28–29 (2d Cir. 1963), the court stated that imprisonment for illegal departure was punishment and only became persecution if it was excessive. "However repugnant to our own concept of justice, a brief confinement for illegal departure or for political opposition to a totalitarian regime would not necessarily fall within the ambit of [§ 243(h)]. We are unwilling to believe, however, that Congress has precluded from relief under § 243(h) an alien threatened with long years of imprisonment, perhaps even life imprisonment. . . ." *Accord, In re Dunar,* 14 I. & N. Dec. 310, 324 (1973).

Furthermore, your concern that a foreign government could "create 'political' opponents for opportunistic reasons" arises from the language of the Act itself. A foreign nation may do so whenever it determines to persecute particular groups and may single out virtually any social group or political view to implement its "opportunistic reasons." If this possibility is to be eliminated, Congress has the means at its disposal to do so.

As noted above, an application for refugee status should normally be reviewed on an individual basis. One of the major purposes of the Act was to allow the President to select those refugees for admission who were of "special humanitarian concern to the United States." Act, § 207(a)(3), to be codified at 8 U.S.C. § 1157(a)(3). Individual interviews would seem to be the easiest and best way to identify those who have an especially strong claim on us as well as to determine how "well-founded" the fear is in differently situated individuals. *See* Handbook, ¶¶ 44–45. A country may produce political refugees as well as economic migrants and the Act requires that the two groups be distinguished. *In re Williams,* 16 I. & N. Dec. 697, 703 (1979) (Haiti). Group determinations are usually reserved for situations in which the need to provide assistance is extremely urgent and political reasons preclude an individual determination of status.

We are not in a position to evaluate the situation that now exists in Southeast Asia with regard to whether Laos, Kampuchea, and Vietnam are persecuting those who leave because departure is viewed as a political act.[12] We do believe, as the courts have recognized, that an alien outside his country may have a well-founded fear of persecution if his country is persecuting departure as a political act. *Henry, supra.* Whether the fear exists should, except in exceptional circumstances, be evaluated on an individual basis.

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[11] You have expressed concern that the government will be swamped with asylees, 8 U.S.C. § 1253(h), if a country close to the United States adopts such a policy. Memorandum, at 8–9. We believe that a solution to such a problem, to the extent it exists, must come from the Legislative Branch.

[12] Letter from the Acting Director, Bureau for Refugee Programs, to the Acting Commissioner, Immigration and Naturalization Service, Feb. 27, 1981, at 3.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Constitutionality of Legislation Authorizing Permanent Resident Status for Certain Nonimmigrant Aliens

Legislation which would grant permanent residence status to certain nonimmigrant alien workers residing in the Virgin Islands, and at the same time restrict these individuals' ability to obtain the entry of relatives under otherwise applicable provisions of the Immigrant and Nationality Act, does not violate the Equal Protection Clause.

The application of the equal protection principle to aliens is subject to the special powers of Congress over immigration and naturalization, and even the constitutional rights of citizens must yield where they clash with the paramount power of Congress over the admission and exclusion of aliens.

August 24, 1981

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE

This responds to your request for our opinion regarding the constitutionality of H.R. 3517 (97th Cong. 1st Sess.), particularly § 2(c)(2) & (3). H.R. 3517 would provide generally that certain persons originally admitted temporarily to the Virgin Islands as nonimmigrant alien workers under § 101(a)(15)(H)(ii) of the Immigration and Nationality Act (Act) 8 U.S.C. § 1101(a)(15)(H)(ii) (H-2 workers), may have their status adjusted to that of aliens lawfully admitted for permanent residence. The bill, would, as will be explained, restrict the ability of its beneficiaries to facilitate the immigration of some of their relatives under the preference provisions of § 203 of the Act. Your inquiry is addressed to the consitutionality of those restrictions. It is our conclusion that the courts would uphold the constitutionality of § 2(c)(2) & (3).

I.

The background of the bill, as explained in the testimony of Associate Commissioner Carmichael of the Immigration and Naturalization Service (INS) before the House Judiciary Committee, is as follows: In the 1950s and 1960s during an acute labor shortage in the Virgin Islands, over 13,000 alien workers entered the Virgin Islands under the H-2 program. Most of those workers left the Virgin Islands during the 1970s, but about 2000 of them and their dependents remain there. Although they were admitted as temporary workers, their work has been of a permanent nature and over the years they have made valuable contributions to the economy of the Virgin Islands. Moreover, having lived in the United States for long periods, they have raised families there and those of their children who were born on United States soil are American citizens. The bill would permit the adjustment of the status of those H-2 workers who have resided continuously in the Virgin Islands for the past six years and of their spouses and foreign born children to that of aliens lawfully admitted for permanent residence.

It is estimated that the enactment of the bill would result in the adjustment of the status of less than 5600 persons who have resided in the Virgin Islands for considerable periods of time. Hence, the change of their status from nonimmigrant to lawfully admitted for permanent residence, as such, is not likely to create any appreciable ethnic or social dislocation, even in a small island community such as the Virgin Islands, which has slightly less than 100,000 inhabitants.

In the past, legislation such as H.R. 3517 has apparently been impeded by the prospect that, after the status of the H-2 workers has been adjusted to that of aliens lawfully admitted for permanent residence, their frequently large families living abroad could enter the United States under the immediate relative provisions of § 201 [1] or under the preference provisions of § 203 of the Act,[2] and settle in the same area in which their sponsors live. Moreover, once a relative is lawfully admitted for permanent residence, he in turn may file second preference petitions for his spouse and unmarried sons and daughters. This secondary, and potentially snowballing, effect of the regularization of the status of H-2 workers could result in the influx of a substantial number of aliens into the Virgin Islands—possibly greater than the number of those whose status would be adjusted under the bill, and in contrast to the adjustment of status of the long-time resident H–2 workers and their families, is likely to create serious ethnic, social, and financial problems.[3]

According to the opening clause of § 2(c)(2), the bill would seek "to alleviate the possible adverse impact of immigration into the Virgin Islands of the United States by relatives of aliens who have had their status adjusted" under the legislation by curtailing the availability of the preference provisions of § 203 to the relatives of those who had their status adjusted under the provisions of the bill.

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[1] Immediate relatives, *i.e.*, minor unmarried children, parents, and spouses, of citizens of the United States may be admitted to the United States without being counted against the numerical limitations. 8 U.S.C. § 1151(b).

[2] The preference provisions pertinent to this memorandum are second preference: the spouse and unmarried sons and daughters of aliens lawfully admitted for permanent residence; fourth preference: married sons and daughters of citizens of the United States; and fifth preference: brothers and sisters of citizens of the United States. 8 U.S.C. § 1153(a)(2), (4), (5).

[3] This problem is one which has prevented the adjustment of the status of H-2 workers on Guam, and resulted in the postponement of the extension of the Act to the Northern Mariana Islands. *See* Covenant with the Northern Mariana Islands § 503(a), 48 U.S.C. § 1681 note.

Section 2(c)(2) would authorize the Secretary of State to curtail the number of visas available to those for whom second preference petitions[4] are filed by an alien whose status has been adjusted pursuant to the provisions of the bill. Section 2(c)(3)(A) would provide that no alien may receive an immigrant visa by virtue of a fourth or fifth preference petition[5] filed by a citizen of the United States who had his status adjusted under the bill, unless the citizen is physically present and has resided continuously for at least two years in a state, or unless the Attorney General makes a finding of exceptional and extremely unusual hardship. Finally, the complex language of § 2(c)(3)(B) provides in effect that if a person whose status was adjusted under the bill secures after his naturalization the admission of a parent as an immediate relative under § 201, that parent cannot file a second preference petition for an unmarried son or daughter.[6]

II.

In evaluating the constitutionality of these restrictions on the preference provisions of § 203, we begin with two propositions: first, no alien has the constitutional right to enter the United States, *Kleindienst* v. *Mandel,* 408 U.S. 753, 762 (1972), and second, no citizen has the constitutional right to have his relatives admitted to the United States. *Fiallo* v. *Bell,* 430 U.S. 787 (1977).

While the ability to facilitate the immigration of close relatives is not a constitutional right, it constitutes a valuable statutory benefit.[7] This raises the question whether the ability of citizens to file fourth and fifth preference petitions, generally available to all citizens, may be denied to some citizens because their status has been adjusted under the provisions of this bill,[8] and whether the ability to file second preference petitions, generally available to all aliens lawfully admitted for permanent residence, may be curtailed to some aliens because they or their sponsors had their status adjusted under the provisions of the bill. While the Fifth Amendment to the Constitution does not contain an express Equal Protection Clause, it does forbid discrimination which amounts to a denial of due process. *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954).

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[4] *I.e.,* spouses and unmarried sons and daughters of aliens lawfully admitted for permanent residence.

[5] *I.e.,* married sons and daughters and brothers and sisters of citizens of the United States.

[6] The apparent reason for this provision is that unmarried sons and daughters would be the brothers or sisters of the citizen who, under § 2(c)(3)(A), cannot be admitted under a fourth or fifth preference petition unless the citizen has resided in a state for at least two years.

[7] The distinction between rights and privileges has been rejected by the Court. *See Graham* v. *Richardson* 403 U.S. 365, 374 (1971); *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972).

[8] The bill does not deprive a citizen absolutely of his ability to file fourth and fifth preference petitions, but conditions it on his giving up his residence in the Virgin Islands. The right to maintain the residence of his choice appears to be the logical correlative of the basic constitutional freedom to travel. *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250, 254 (1974).

A.

The application of the equal protection principle to aliens, even those lawfully admitted for permanent residence, is subject to the special powers of Congress over immigration and naturalization. The Court observed in *Mathews* v. *Diaz,* 426 U.S. 67, 80 (1976), that under those powers "Congress regularly makes rules that would be unacceptable if applied to citizens," and upheld legislation which discriminated against aliens and among different classes of aliens lawfully admitted for permanent residence. *Ibid.* The Court also expressed its "special reluctance" to question the exercise of congressional judgment in this field. *Id.* at 84. We believe that § 2(c)(2) and § 2(c)(3)(B), relating to second preference petitions filed by aliens lawfully admitted for permanent residence, would be held constitutional under the Court's analysis because Congress' attempt to deal with this particular situation in the manner contemplated is surely reasonable.

B.

Section 2(c)(3)(A), which relates to fourth and fifth preference petitions filed by citizens of the United States, raises constitutional issues of a different nature. *Schneider* v. *Rusk,* 377 U.S. 163, 165–66 (1964), reaffirmed the basic rule, going back to *Osborn* v. *Bank of the United States,* 22 U.S. (9 Wheat.) 738, 827 (1824), and embodied in the Fourteenth Amendment, that, with the exception to the qualification for the Presidency, the rights of naturalized citizens are of the same dignity and coextensive with those of native born citizens. Basically, every naturalized citizen has the same stature under our Constitution as every other citizen, whether native born or naturalized.

Equal protection claims, however, are subject to the power of Congress to make differentiations for justifiable reasons, to further important governmental objectives, or to advance legitimate state interests. *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954); *Schneider* v. *Rusk, supra,* at 168; *Craig* v. *Boren,* 429 U.S. 190, 197 (1976); *Califano* v. *Webster,* 430 U.S. 313, 316–17 (1977); *Duke Power Co.* v. *Carolina Environmental Study Group,* 438 U.S. 59, 84–94 (1978); *Vance* v. *Bradley,* 440 U.S. 93, 97 (1979). The purpose of the discriminatory provision of § 2(c)(3)(A) is, as explained above, to prevent a substantial surge of immigration into the Virgin Islands some five to seven years after the enactment of the bill when the H-2 workers, whose status would be adjusted under the bill, will have become naturalized citizens and will be able to file fourth and fifth preference petitions. In view of the general reluctance of the courts to reexamine congressional policies in the field of immigration, *Galvan* v. *Press,* 347 U.S. 522, 531–32 (1954); *Fiallo* v. *Bell,* 430 U.S. 787, 792–796 (1977), we believe the courts should and would recognize the congressional determination that § 2(c)(3)(A) serves an important governmental purpose,[8] and, on that basis, reject any constitutional challenge to that provision.

In addition, even constitutional rights of citizens must yield where they clash with the paramount power of Congress over the admission and exclusion of aliens. *Kleindienst* v. *Mandel, supra,* at 762, held that the power of Congress to deny admission to what it considers to be undesirable aliens prevails over a citizen's First Amendment right to "receive information and ideas." *Fiallo* v. *Bell, supra,* comes even closer to the issue here involved. In that case fathers of illegitimate children claimed that the provisions of the Act pursuant to which they were precluded from obtaining the entry of their illegitimate children as immediate relatives under § 201(a) of the Act, while mothers were permitted to do so, constituted an unjustifiable discrimination based on the sex of the citizen parent. The Court held, in effect, that this argument was irrelevant as against the plenary powers of Congress to define the classes of aliens who may be admitted. 430 U.S. at 792, 794, 795, and n.6.

Based on the foregoing analysis, we are satisfied that the courts will uphold the constitutionality of § 2(c)(3)(A).

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

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[8] It should be noted that in contrast to § 2(c)(2), § 2(c)(3)(A) does not contain a recital of the purpose it is designed to accomplish. Nor are we aware of any congressional finding to the effect that the filing of fourth and fifth preference petitions by citizens whose status has been adjusted by the bill is more likely to have an adverse impact on the Virgin Islands than the filing of like petitions by other citizens of the United States. We strongly recommend the inclusion of such findings in the legislation or its legislative history in order to lessen the prospect that judicial inquiry into the legitimacy of the governmental purpose served by the bill would lead to a finding of unconstitutionality.

Extension of District Court Jurisdiction Under § 1110 of the Federal Aviation Act

Section 1110 of the Federal Aviation Act authorizes the President to extend that Act to areas outside the United States, but does not authorize an analogous extension of the geographic jurisdiction of a district court for purposes of enforcing certain of the Act's provisions. An executive order extending the Act to the Trust Territory of the Pacific Islands (TTPI) would make its provisions part of the law of the TTPI, and enforceable through the TTPI judicial system.

August 27, 1981

MEMORANDUM OPINION FOR THE ASSISTANT CHIEF COUNSEL, FEDERAL AVIATION ADMINISTRATION

This responds to your request for the guidance of this Office on the question whether the President has authority under § 1110 of the Federal Aviation Act of 1958, as amended (49 U.S.C. § 1510) (Act), to extend by executive order a judicial district of the United States in support of a geographical extension of the Act by executive order. You understand that our response to your inquiry was delayed in view of the difficulties you had in ascertaining the manner under which similar problems were solved under Executive Order No. 11,326, 3 C.F.R. 617 (1966–1970 Comp.), which extended parts of the Federal Aviation Act to the Ryukyu Islands. We have been advised now that the issue did not arise at that time because the provisions of the Federal Aviation Act under which this problem becomes critical were not extended to the Ryukyu Islands.

Section 1110 of the Federal Aviation Act, 49 U.S.C. § 1510, provides:

> Whenever the President determines that such action would be in the national interest, he may, to the extent, in the manner, and for such periods of time as he may consider necessary, extend the application of this Act to any areas of land or water outside of the United States and the overlying airspace thereof in which the Federal Government of the United States, under international treaty, agreement or other lawful arrangement has the necessary legal authority to take such action.

Under the authority of this section, Titles III and XII of the Act already have been extended by Executive Order No. 10,854, 3 C.F.R.

389 (1959–1963 Comp.), "to those areas of land or water outside the United States and the overlying airspace thereof over or in which the Federal Government of the United States . . . has appropriate jurisdiction and control." This definition, as pointed out in your memorandum, includes the Trust Territory of the Pacific Islands (TTPI). It is now contemplated to extend most of the titles of the Act to the TTPI in order to enable aircraft owned by citizens of the Micronesian entities to be registered in the United States. Your agency feels that such extension of the Act to the TTPI is feasible only if the Act and the regulations of the Federal Aviation Administration can be fully enforced with respect to persons located in the violations occurring in the TTPI.

The Act provides for its enforcement largely through civil and criminal proceedings in the district courts in which the offense or violations are committed, or where the person committing a violation of the Act carries on his business. §§ 903, 904, 1007 (49 U.S.C. §§ 1473, 1474, 1487). Because the TTPI is not within any federal judicial district, the question arises how the Act can be effectively enforced in the TTPI.[1] This gives rise to the question whether the President's authority under § 1110 of the Act includes the power both to extend the Act to areas outside the United States and the power to extend the geographic jurisdiction of a district court to an area outside the United States to which the Act has been made applicable.

In our view this question must be answered in the negative. The jurisdiction of the federal district courts is purely statutory. Section 1110 does not expressly confer on the President the power to extend the geographical jurisdiction of the district courts, and such power is not easily implied from the language of that section. Moreover, it cannot be said that this power follows by necessary implication because § 1110 would be nugatory in the absence of a judicial forum in which the extension of the Act could be enforced. The experience of Executive Order Nos. 10,854 and 11,326 shows that some titles of the Act can be extended without a concomitant extension of the jurisdiction of a federal court. In addition, § 903(a) provides for a forum for some violations of the Act outside the United States. *See supra* note 1.

Our conclusion that § 1110 of the Act does not confer on the President the power to enlarge the geographic jurisdiction of a federal district court, however, does not mean that there is no available means of enforcing the provisions of the Act in the event it is extended to the

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[1] Section 903 provides that where an "offense is committed out of the jurisdiction of any particular State or district, the trial shall be in the district where the offender . . . is arrested or is first brought." This provision does not appear to be sufficiently effective in the case of non-resident aliens.

TTPI. According to § 101(2) of Title I of the Trust Territory Code (1970):

> (2) such laws of the United States, as shall, by their own force, be in effect in the Trust Territory, including the Executive Orders of the President and orders of the Secretary of the Interior .

have the effect of law in the TTPI. An executive order extending the Act to the TTPI therefore would be a part of the law of the TTPI and judicially enforceable there. However, since the judicial system of the TTPI is controlled by orders of the Secretary of the Interior, we would suggest that you consult with the Office of the Solicitor of the Interior on the best method of conferring enforcement jurisdiction on the TTPI High Court.

LARRY L. SIMMS
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Office of Legal Counsel

Procedures for Implementing the Reciprocity Provisions of the Mineral Leasing Act of 1920

While the Department of Interior has no legal obligation to adopt substantive, prospective standards for applying the "reciprocity" provision of 30 U.S.C. § 181, if it chooses to do so it should comply with the public, notice-and-comment procedures applicable to agency rulemaking under the Administrative Procedure Act (APA). If the Department of the Interior instead continues to determine on a country-by-country basis whether another country's laws and regulations accord American investors "similar or like privileges," APA procedures would not be considered applicable to such decisionmaking. However, an adequate record for judicial review of the substance of the ultimate decision should be made.

As previously concluded, the Secretary of the Interior has authority under the Mineral Leasing Act of 1920 to "mirror" restrictive practices of another country. The question whether the Secretary is required to do so, or whether he could choose to take some more extreme action such as barring any investment by the other country's citizens, is not addressed.

August 27, 1981

MEMORANDUM OPINION FOR THE UNDER SECRETARY, DEPARTMENT OF THE INTERIOR

You have requested this Department's comments on certain proposed actions that would implement the "reciprocity" provision of the Mineral Leasing Act of 1920, 30 U.S.C. § 181.[1]

I. Actions to Implement § 181

It is not clear to us precisely what your Department's intent may be regarding the implementation of the "reciprocity" provision of § 181. If the intent is to promulgate general, substantive standards for the future governing the determination whether another country affords Americans "similar or like privileges" under § 181, we would recommend adoption of public notice-and-comment procedures meeting the requirements of 5 U.S.C. § 553. Even though we do not believe your Department has any legal obligation to adopt substantive, prospective standards for applying § 181,[2] if you do so a court likely would conclude that such action comes within the definition of "rule making" for purposes of the Administrative Procedure Act (APA).[3] Although an argument might be made that such rulemaking is exempt from the requirements of § 553 on the ground that is involves a foreign affairs function of the United States, 5 U.S.C. 553(a)(1), that argument would be difficult to sustain so long as your Department's intent is to enunciate general standards for application of the statutory phrase "similar or like privileges" apart from specific consideration of this Nation's relations with another country.[4] Furthermore, since your Department in the past has not enunciated general standards implementing § 181, a public notice-and-comment procedure consistent with § 553 designed to promulgate standards for applying § 181's "similar or like privileges" provision could well generate comments that may prove useful in framing the final standards. Finally, if your intention is to conduct a rulemaking, it is not a great deal more cumbersome to comply with § 553, and if you are going to go part of the way, it would be prudent to go all of the way and avoid any possible claim that § 553 was violated. To the extent that this is your intent, the notice-and-comment procedure should include at a minimum the following elements: (1) general notice to be published in the Federal Register, including a statement of the time, place, and nature of the proceedings, a reference to the legal authority under which the rule is to be promulgated, and either the terms or substance of a proposed rule or "a description of the subjects and issues involved"; (2) an opportunity for interested persons to participate through submission of written data, views, or arguments with or without opportunity for oral presentation; and (3) a concise general statement of the basis and purpose of the rules ultimately promulgated, including a discussion of major comments received from interested persons.[5]

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[1] The "reciprocity" provision is as follows:

> Citizens of another country, the laws, customs or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this chapter.

30 U.S.C. § 181.

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[2] There is no requirement in the Mineral Leasing Act of 1920 that the Secretary of the Interior promulgate rules to implement § 181. However, the Act clearly authorizes such action: "The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter. . . ." 30 U.S.C. § 189.

[3] A "rule" is defined broadly by the APA as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . .", 5 U.S.C. § 551(4), and a "rule making" is defined as the "agency process for formulating, amending, or repealing a rule," 5 U.S.C. § 551(5). The paradigm of APA rulemaking is "the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts." *Attorney General's Manual on the Administrative Procedure Act* 14 (1947), *quoted in American Airlines, Inc.* v. *CAB*, 359 F.2d 624, 629 (D.C. Cir. 1966); *See also* S. Rep. No. 752, 79th Cong., 1st Sess. (1945), *reprinted in* S. Doc. No. 248, *Administrative Procedure Act—Legislative History*, 79th Cong., 2d Sess. 199 (1946). Whatever else may be said about the applicability of the APA's definitions of a "rule" and "rule making," they would appear to apply to a process in which the Department of the Interior establishes general, substantive standards "for the future" governing whether another country accords American citizens "similar or like privileges" under 30 U.S.C. § 181.

[4] *See* S. Rep. No. 752, 79th Cong., 1st Sess. 11 (1945) (the foreign affairs exception "is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only those 'affairs' which so affect relations with other governments that, for example, public rule making provisions would clearly provoke definitely undesirable international consequences"), *reprinted in* S. Doc. No. 248, *Administrative Procedure Act—Legislative History*. 79th Cong., 2d Sess. 199 (1946); *Hou Ching Chow* v. *Attorney General*, 362 F. Supp. 1288, 1290 (D. D.C. 1973) (holding that determinations regarding the adjustment of an alien's status and labor certification requirements are not exempt as foreign affairs functions). *Cf. WBEN, Inc.* v. *United States*, 396 F.2d 601, 616 (2d Cir.), *cert. denied* 393 U.S. 914 (1968) (holding, *inter alia*, that the FCC was on "firm ground" in concluding that negotiation by the United States on a new agreement with Canada regarding pre-sunrise broadcasting on AM radio was an exempt foreign affairs function).

On the other hand, your Department may not intend to promulgate general, prospective standards implementing the "reciprocity" provision of § 181. Rather, it may intend to continue to determine on a country-by-country basis whether another country's laws and regulations accord Americans "similar or like privileges." Although an argument could be made that such country-by-country decisionmaking should be governed by § 553 rulemaking, we do not believe, as we have indicated orally, that § 553 or other provisions of the Administrative Procedure Act should be considered applicable to such decisionmaking.[6] First, the determination whether another country's laws and regulations accord "similar or like privileges" requires an assessment of the facts—regarding the way another country's laws affect investment by Americans as compared with the way this country's laws affect investment by that country's citizens—at the time the decision is made. It thus is in the nature of a backward-looking evaluation of facts in light of existing statutory requirements. That decision is not of a type covered by "rule makings" for APA purposes, which are geared toward the promulgation of general standards "for the future." [7] Second, even if such a decision about another country were to be considered covered by the APA's definitions of a "rule" and "rule making," so long as the decision is directed—as it presumably would be—toward interpreting official acts of a foreign government and ascertaining what responses the United States might make to restrictive laws or regulations of the other country, such a decision would be within the foreign affairs exemption from § 553 procedures. *See* 5 U.S.C. § 553(a)(1); S. Rep. No. 752, 79th Cong., 1st Sess. (1945), *reprinted in* S. Doc. No. 248, *Administrative Procedure Act—Legislative History,* 79th Cong., 2d Sess. 199 (1946).

If your Department were to proceed on a country-by-country basis and not adopt public notice-and-comment procedures for establishing general standards governing whether another country accords "similar or like privileges," it would be necessary to bear in mind that judicial review of informal, case-by-case decisions not covered by § 553 may be obtained in appropriate cases. In particular, a decision whether another country accords "similar or like privileges" could be challenged as contrary to the substantive requirements of § 181 (*e.g.*, on the ground that a legally incorrect interpretation of § 181 was applied), or as "arbitrary" or "capricious" in the context in which it was made (*e.g.*, on the ground that there was no rational basis on which the Secretary could make such a determination). *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971); *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). Thus, if a country-by-country approach were taken, your Department would need to follow a decisionmaking process that would provide an adequate record for judicial review of the substance of the ultimate decision. We do not believe, however, that any statute, including the Administrative Procedure Act, requires that a particular process be followed.[8]

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[5] In addition, the notice-and-comment procedures should conform with the Department's own regulations governing its rulemaking activities, *see* 43 C.F.R. Part 14, and with Executive Order No. 12,291, 46 Fed. Reg. 13,193 (1981).

[6] The Mineral Leasing Act of 1920 does not require that determinations under § 181 be made "on the record" after opportunity for agency hearing. Thus, the APA procedures for "on the record" determinations do not apply. *See* 5 U.S.C. §§ 553(c), 554, 556, & 557.

[7] *See* n.3, *supra.*

II. The Substance of § 181

I am attaching for your information an opinion of this Office, dated August 11, 1981, discussing the question whether the Secretary may "mirror" restrictive practices of another country, thereby restoring "similar or like privileges" under § 181 and averting the need to bar "any" interest in "any" lease by citizens of the other country.[*] We concluded that the Secretary has such "mirroring" authority under the Mineral Leasing Act of 1920. We understand that this conclusion is consistent with the practice of the Department of the Interior, which on at least two occasions has "mirrored" other countries' restrictions pertaining to the percentage of foreign ownership of corporations having interests in those countries' mineral resources.[9]

THEODORE B. OLSON
Assistant Attorney General
Office of Legislative Affairs

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[8] Our discussion of the procedures for implementing § 181 has focused on the question that appears central to your Department's present concern, namely, how to establish a process for determining whether another country accords "similar or like privileges." Once such a determination is made, further questions are likely to arise regarding the appropriate means for applying a determination about a given country to particular parties seeking federal mineral leases. We would be glad to assist in resolving such questions as they arise.

[*] NOTE: The August 11, 1981 Memorandum Opinion, "Restrictions on Canadian Ownership of Federal Mineral Leases Under the Mineral Leasing Act of 1920," is reprinted in this volume at p. 250, *supra*. Ed.

[9] We would not want this memorandum or our opinion of August 11, 1981, to be understood as resolving the additional question whether, assuming the Secretary could as a practical matter "mirror" another country's restrictions on foreign investment, the Secretary would be bound to do that, or whether he could choose whether to do that or to take a more extreme action such as barring "any" investment by the other country's citizens in federal mineral leases. We have not addressed that issue. We suggest that specific attention be given this question if the Secretary would consider taking more restrictive action than "mirroring" under § 181.

Applicability of the Federal Advisory Committee Act to Law Enforcement Coordinating Committees

If the functions of Law Enforcement Coordinating Committees (LECCs) are limited to the exchange of information, or to making operational decisions involving law enforcement matters, they will not be covered by the Federal Advisory Committee Act (FACA). However, to the extent that a LECC performs "advisory functions" by giving advice and recommendations to federal officials, it would be subject to the FACA's requirements when performing those functions.

September 10, 1981

MEMORANDUM OPINION FOR THE ACTING DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

This responds to your request that we provide advice about the Federal Advisory Committee Act (FACA) [1] for the United States Attorneys who are charged with establishing Law Enforcement Coordinating Committees (LECCs).[2] The central issue that will be of concern to the United States Attorneys is whether the LECCs are "advisory committees" and thus subject to the FACA's procedural requirements.[3] So long as the actual operations of LECCs conform to the limitations stated in the Associated Attorney General's memorandum providing instructions about their establishment and functions, we conclude that the FACA will not apply to them.

The FACA defines the term "advisory committee" broadly as any "committee, board, commission, council, conference, panel, task force, or other similar group," as well as any subgroup or subcommittee thereof, that is either "established" or "utilized" by a federal agency or the President in the interest of obtaining advice or recommendations.[4]

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[1] Pub. L. No. 92-463, 86 Stat. 770, 5 U.S.C. App. (1976).

[2] LECCs are to be established pursuant to Attorney General Order No. 951-81 (July 21, 1981). They are to be comprised of federal, state, and local law enforcement officials in each district.

[3] The FACA requires, *inter alia*, that a charter must be prepared before an advisory committee may be constituted, that public notice of all committee meetings must be provided, and that all meetings must be opened to the public unless one of the specific exemptions in 5 U.S.C. § 552b(c)—made applicable to advisory committees in § 10(d) of the FACA—is found to apply. *See* §§ 9 & 10 of the FACA.

[4] *See Consumers Union of United States, Inc.* v. *Department of HEW*, 409 F. Supp. 473, 475 (D.D.C. 1976), *aff'd mem.*, 551 F.2d 466 (D.C. Cir. 1977) ("The Act defines advisory committee in a general, open-ended fashion"). It is not necessary for a "committee" to be "established" as an "advisory committee" in order for it to be covered by the FACA. It may be so covered as long as it is "utilized" as such a committee, even though never formally established as such.

The LECCs are clearly to be "established" as "committees," for they are to have a definite membership, regular meetings, agendas, a subcommittee structure, and other attributes of formal committee organizations. *Cf. Nader* v. *Baroody,* 396 F. Supp. 1231, 1233 (D.D.C. 1975), *vacated as moot,* No. 75–1969 (D.C. Cir 1977); *National Nutritional Foods Ass'n* v. *Califano,* 603 F.2d 327, 334–36 (2d Cir. 1979). Also, the FACA's specific exemptions from coverage do not apply to the LECCs.[5] Accordingly, the only basis for concluding that the LECCs are not "advisory committees" is that they may not be "established" or "utilized" by federal officials in the interest of obtaining advise, in particular from the state and local officials who are to be members.[6] In specific terms, the functions of the LECCs may not be advisory at all but rather may be oriented toward (1) the exchange of information and/or (2) the performance of "operational" responsibilities. We will discuss each possibility in turn.

(1) The FACA defines an "advisory committee" as a committee established or utilized "in the interest of obtaining advice or recommendations" for federal agencies or officers. *See* § 3(2). Thus, to the extent that a committee's function is to provide a forum for the exchange of information and data—not advice and recommendations—the committee by definition will not be an "advisory committee." [7]

With respect to the LECCs, the Associate Attorney General's memorandum states at several points that certain of a committee's or subcommittee's functions[8] are to be limited to the exchange of information. So long as that is the case, the FACA will not apply with respect to those functions. If in practice the committee's functions differ from those stipulated in the Associate Attorney General's memorandum, the FACA's applicability should be reexamined.

(2) A committee established by a federal agency also may not be an "advisory committee" so long as its functions are specifically operational, not advisory. This distinction is expressed in joint Department of Justice-Office of Management and Budget draft guidelines interpret-

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[5] The FACA specifically exempts committees comprised wholly of full-time federal employees. *See* § 3(2). It also exempts committees established or used by the Central Intelligence Agency or the Federal Reserve System, *see* § 4(b); "any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies," *see* § 4(c); and certain particular committees in existence when the FACA was enacted, *see* § 3(2). The LECCs are not to be comprised solely of federal employees. They also could not be characterized as "local civic groups" or as "State or local committees" established to advise state or local officials or agencies. They also come within none of the other specific exemptions from coverage.

[6] A committee comprised solely of federal, state, and local employees may be an "advisory committee" if it provides a forum for the state and local officials to advise federal officials. *See Center for Auto Safety* v. *Cox,* 580 F.2d 689 (D.C. Cir. 1978).

[7] It is possible for a committee to have mixed functions, some "advisory" and others not. To the extent that a committee has advisory functions at all, it would normally be considered an advisory committee when performing those functions, barring distinguishing factors.

[8] The definition of "advisory committee" makes plain that a "subcommittee" or "subgroup" of an advisory committee is itself covered by the FACA. *See* § 3(2).

ing the FACA, 38 Fed. Reg. 2306 (Jan. 23, 1973). The distinction, which has been applied by this Department since the Act's passage, is confirmed by the legislative history.[9] The key question in applying it is whether a committee's functions are "operational" instead of advisory. Although that term may not be susceptible to precise definition, it has been employed by this Office to refer generally to the making or implementation of concrete decisions by the members of a committee or subcommittee, as opposed to offering advice to officials who will make the decisions themselves. *See generally Amending the Federal Advisory Committee Act: Hearings on S. 2947 Before the Subcommittee on Reports, Accounting, and Management, Senate Committee on Government Operations,* 94th Cong., 2d Sess. (1976) (testimony of Deputy Assistant Attorney General Lawton). This usage is consistent with the dictionary's definitions of "operational" as "of or relating to operation or an operation" and of "operation" as, *inter alia,* "doing or performing of a practical work" and "an exercise of power or influence." *Webster's Third New International Dictionary* 1581 (1976).

In several places the Associate Attorney General's memorandum provides that the functions of certain subcommittees involve the performance of operational responsibilities.[10] These could include, for instance, making decisions about how to proceed in particular cases, of formulating operational procedures for handling a set of related cases or law enforcement problems. To the extent that the responsibilities of a subcommittee or a full committee are limited to such operational matters, the FACA would not apply.

In sum, if the functions of the LECCs and their subcommittees are limited in the manner set forth in the Associate Attorney General's memorandum either to the exchange of information, or to making operational decisions involving law enforcement matters, they will not be covered by the FACA.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[9] *See* H.R. Rep. No. 1017, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 3494 ("The term advisory committee as used in this bill does not include committees or commissions which have operational responsibilities.").

[10] In order for a subcommittee or a full committee to be able to perform "operational" functions, it is necessary that members have the authority to so act. That is the reason for the stipulation in the Associate Attorney General's memorandum that LECC members are to have the authority to make operational decisions.

Federal Bureau of Investigation Participation in Wire Interceptions in Cases Where It Lacks Investigative Responsibility

Under 18 U.S.C. § 2516(1), the Federal Bureau of Investigation (FBI) may be judicially authorized to participate in Title III interceptions of wire or oral communications directed at narcotics-related offenses, even though the Drug Enforcement Administration and not the FBI has general investigative responsibility for such offenses.

The plain language of § 2516(1) authorizes the FBI to participate in court-approved interceptions directed at any of the offenses listed in that section, and the legislative history lends support to its "plain meaning" interpretation.

September 29, 1981

MEMORANDUM OPINION FOR THE ASSISTANT DIRECTOR FOR LEGAL COUNSEL, FEDERAL BUREAU OF INVESTIGATION

This responds to your request for our opinion whether, pursuant to 18 U.S.C. § 2516(1)(1976 and Supp. IV 1980), the Federal Bureau of Investigation (FBI) may be authorized by a court to participate in Title III interceptions directed at offenses for which the FBI has no general investigative responsibility. This legal question has arisen in the context of investigations of narcotics-related offenses over which the Drug Enforcement Administration (DEA)—not the FBI—has been delegated general investigative responsibility by the Attorney General. *See* United States Attorneys' Manual, Section 9-1.122 (Oct. 17, 1977); 21 U.S.C. § 871(a). In particular, in a case in which the DEA seeks authorization for an interception directed at narcotics offenses, and in which there is no probable cause to seek authorization for in interception directed at other offenses for which the FBI has general investigative responsibility, the question is whether the FBI as well as the DEA may be authorized to participate in an interception. If, as the FBI's Legal Counsel Division has concluded, the FBI can participate in a Title III interception only when it has general investigative responsibility for the offense at which the interception is directed, then the FBI could not be authorized by a court to participate in an interception in such a case.[1]

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[1] The Attorney General could, if he chose to do so, delegate general investigative jurisdiction over narcotics-related offenses to the FBI. *See* 21 U.S.C. § 871(a). Unless he does so, however, such jurisdiction remains with the DEA. [NOTE: In February of 1982, the Attorney General authorized the

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I.

In our view, § 2516(1) provides authority for the FBI to participate in interceptions in such a case directed at any of the offenses listed in that provision, including narcotics-related offenses, so long as all of the specific procedural requirements of § 2516(1) are satisfied. We conclude that it is not necessary for the FBI to have general investigative responsibility for such offenses before it may participate in court-approved § 2516(1) interceptions directed at them. The basis for this conclusion is the plain language of § 2516(1), which provides in pertinent part:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when interception may provide or has provided evidence of—
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> * * * * *
>
> (e) any offense involving . . . the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States . . .

The foregoing language specifically provides that an application may be made to a court for an order approving an interception "by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of" the listed offenses. In literal terms, this language authorizes the FBI to participate in court-approved interceptions directed at the listed offenses.

An interpretation leading to the contrary result would depend on the premise that the clause within the commas—"or a Federal agency having responsibility for the investigation of the offense as to which the application is made,"—refers to the FBI as well as other federal agencies, thereby requiring the FBI itself to have "responsibility" for the investigation of any offense as to which an interception application is made. That premise lacks specific textual support.[2] We also believe it to

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FBI, concurrently with the DEA, to investigate violations of the criminal drug laws of the United States. *See* Att'y Gen. Or. No. 968-82, 47 Fed. Reg. 4989 (1982). Ed.

[2] A cardinal principle of statutory construction is that the language used by Congress is to be given primary weight. *See, e.g., Southeastern Community College* v. *Davis,* 442 U.S. 397, 405 (1979); *Interna-*

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be contrary to the natural inference to be drawn from the placement of commas around the clause referring to a federal agency having investigative "responsibility," which renders that clause clearly a subordinate, self-contained part of the sentence. No language renders the subordinate clause an express qualification on the sentence's main proposition that the FBI may be authorized to participate in interceptions directed at the listed offenses. It would have been simple to provide, had it been Congress' intent to do so, that the FBI may participate in court-approved interceptions only in those instances where it has investigative "responsibility" for a given offense and not in those where another federal agency has such "responsibility." [3]

II.

Section 2516(1)'s legislative history lends support to its "plain meaning" interpretation. The Senate Judiciary Committee report, S. Rep. No. 1097, 90th Cong., 2d Sess. 97 (1968), explains § 2516(1) as follows:

> The order of authorization may permit the Federal Bureau of Investigation or the Federal agency having responsibility for the investigation of the offense involved to intercept the wire or oral communication. The Department of Justice under the leadership of the Attorney General must be the central focal point of any drive against organized crime, particularly in the collection, analysis, and dissemination of information. It is appropriate that no limitation be placed on the investigations in which the investigative arm of the Department may participate. Organized crime has not limited itself to the commission of any particular offense. No limitation should be placed on the Department of Justice.

This passage speaks of possible judicial authorization of interceptions by "the Federal Bureau of Investigation or the Federal agency having responsibility for the investigation of the offense. . . ." It does not indicate that the FBI must have general investigative responsibility for a given offense before it may be authorized under § 2516(1) to participate in an interception directed at such an offense. Moreover, by stating that "no limitation" should be placed on the investigations in which the investigative arm of the Department of Justice may participate (other

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tional Brotherhood of Teamsters v. *Daniel*, 439 U.S. 551, 558 (1979). A court is not "at liberty to imply a condition which is opposed to the explicit terms of the statute. . . . To [so] hold . . . is not to construe the Act but to amend it." *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 38 (1934), *quoted in Fedorenko* v. *United States*, 449 U.S. 490, 514 (1981).

[3] Section 2516(1)'s intention regarding the identity of the agencies that may execute an interception order is taken for granted in J. Carr, The Law of Electronic Surveillance, § 5.02 at 243 (1977), which merely quotes the provision's language in identifying such agencies: " 'the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made.' "

than, presumably, any limitation mandated by the statutory language), the report underscores the importance placed by the Committee on the FBI's ability generally to participate in court-approved interceptions under § 2516(1). To derive from § 2516(1) a specific limitation on the FBI's authority to participate in interceptions that is not explicitly set forth in the provision would appear inconsistent with this legislative intent.[4]

Additional support for the "plain meaning" interpretation of § 2516(1) derives from a study of predecessor wiretap bills. S. 1308, introduced in the 88th Cong., 1st Sess. (1963), provided in pertinent part that the Attorney General or a specially designated Assistant Attorney General may authorize an application for judicial permission for "the Federal Bureau of Investigation, or any federal agency having investigative responsibility for the crimes set forth in this subsection," to conduct interceptions. The legislative history of S. 1308 includes a letter to the Chairman of the Senate Judiciary Committee from the General Counsel of the Department of the Treasury, dated July 2, 1963, which discusses this provision of S. 1308. The General Counsel objected to the fact that under the provision *either* the FBI *or* the agency charged with investigating the listed offenses—in particular, with investigating narcotics offenses, which then was the responsibility of the Treasury—could be authorized by a court to conduct interceptions. He stated that such "overlapping of authority would be undesirable. . . ." To prevent such an overlap, the General Counsel proposed alternative language providing that the FBI or another agency, "whichever has the investigative responsibility for a crime set forth in this subsection," may be judicially authorized to conduct an interception.[5] That alternative language was not adopted by Congress.

Furthermore, the two bills acknowledged in the legislative history of § 2516(1) as the main sources of the wiretap legislation that was enacted—S. 675 and S. 2050, 90th Cong., 1st Sess. (1967)[6]—differed in a crucial respect in the wording of the relevant provision. S. 675 provided that "the Federal Bureau of Investigation, or *other* Federal agency . . ." having investigative responsibility for certain offenses may be authorized to conduct an interception directed at them (emphasis added). The use of the word "other" in the quoted phrase suggests that the FBI would have had to have general investigative responsibility for the listed offenses. Otherwise, it would have made no sense to refer to another federal agency as the "other" agency having such responsibility. However, the word "other" was *not* included in S. 2050, which spoke instead of "the Federal Bureau of Investigation, or *a* Federal agency . . . ." having investigative responsibility (emphasis added). The pertinent language of S. 2050—*not* that of S. 675—was ultimately enacted.

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[4] The broad principle that "no limitation" should be placed on the FBI's ability to participate in interceptions is not inconsistent with the decision by the Attorney General, pursuant to 21 U.S.C. § 871(a), to delegate general investigative jurisdiction over narcotics-related offenses to the DEA. The broad principle stated in the Senate committee report expresses the intent underlying § 2516(l), not the intent underlying other statutes such as 21 U.S.C. § 871(a). The latter statute authorizes the Attorney General to "delegate any of his functions under this subchapter to any officer or employee of the Department of Justice."

[5] The 1963 letter was later printed in *Criminal Laws and Procedures: Hearings on S. 2187, S. 2188, S. 2189 et al. before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 89th Cong., 2d Sess. 10–11 (1966).

[6] *See* S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968) ("Title III is essentially a combination of S. 675 . . . and S. 2050. . . ."); 114 Cong. Rec. 11755 (1968). S. 675 and S. 2050 are printed in *Controlling Crime Through More Effective Law Enforcement: Hearings on S. 300, S. 552, S. 580 et al. before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess. 76, 1003 (1967).

Thus, the legislative history of § 2516(1) supports the conclusion derived from the provision's plain language that Congress intended that the FBI may be judicially authorized to engage in an interception directed at any of the listed offenses, including narcotics offenses.

III.

This interpretation of § 2516(1) must be tested against the contrary arguments advanced in the memorandum of the FBI's Legal Counsel Division. The memorandum relies not on the provision's language or legislative history, but rather on a reading of *United States* v. *Marion*, 535 F.2d 697 (2d Cir. 1976), and on an argument said to be based on the general purposes of Title III.

The Legal Counsel Division's memorandum summarizes the *Marion* holding as follows:

> In focusing on the investigative interests at the time of interception, the *Marion court requires separate orders, each justifying the agency's investigative jurisdiction,* before interception is permitted. (Emphasis added.)

This reading of *Marion* suggests that under that decision each agency must have general "investigative jurisdiction" over an offense before it may participate in an interception under § 2516(1). However, we are unable to find support for such a reading in the opinion itself. The precise issue in *Marion* was whether the requirement of 18 U.S.C. § 2517(5) for subsequent judicial approval of incidental interceptions of communications relating to offenses other than those specified in an initial wiretap authorization applies to wiretaps initially authorized by an order of a state court.[7] The court of appeals held that, in such cases, the requirement of § 2517(5) does apply. The court explained:

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[7] Section 2517(5) provides:

> When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. *Such contents and any evidence derived therefrom may be used under subsection (3) of this section when*

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> . . . our holding does not 'call into question' the practice of joint federal-state wiretap investigations. Indeed, Title III's framers seem to have specifically envisioned cooperation among law enforcement authorities of different jurisdictions where appropriate to enhance the effectiveness of electronic surveillance operations . . . . If, for example, federal officials called into an ongoing state wiretap operation learned at that time of communications relating to separate federal offenses not specified in the initial interception order, there would be little difficulty in obtaining the requisite subsequent approval pursuant to § 2517. And where federal and state officers pursue an investigation jointly from its inception, we foresee little difficulty for the appropriate federal officer to obtain a separate order authorizing the interception of communications relating to the federal offenses believed involved.[8]

This passage underscores that *Marion* involved § 2517(5). It simply did not deal with, and reached no conclusion about, the precise issue before us regarding § 2516(1).

A broader argument in the Legal Counsel Division's memorandum is that a construction of § 2516(1) permitting the FBI to participate in court-authorized interceptions relating to all offenses enumerated in that provision would be in tension with Title III's underlying purposes, which include placing restrictions on interceptions in order to protect citizens' privacy interests. To be consistent with such a purpose, courts have noted that Title III should be carefully construed. *See, e.g., United States* v. *Giordano,* 469 F.2d 522, 530 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974). The Legal Counsel Division suggests that in order to be consistent with this canon of careful construction, it is necessary to interpret § 2516(1) as not allowing the FBI to participate in an interception unless it has general investigative responsibility for the offense at which an interception is directed.

We agree that Title III, and hence § 2516(1), must be carefully construed. We do not agree, however, that such a construction must include reading language into § 2516(1) that is not there, especially when the legislative history shows that one of the two major bills

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authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable. [Emphasis added.]

[8] 535 F.2d at 707. *Cf. United States* v. *Manfredi,* 488 F.2d 588, 601 (2d Cir. 1973), *cert. denied* 417 U.S. 936 (1974) (noting that 18 U.S.C. § 2517 authorizes disclosure to appropriate law enforcement officials of evidence gained as a result of an authorized wiretap, and concluding: "If such information may be exchanged after the termination of the surveillance, we perceive no reason why that information may not be disclosed to cooperating agencies contemporaneously with its interception."); *United States* v. *Masciarelli,* 558 F.2d 1064, 1067–68 (2d Cir. 1977); *United States* v. *Webster,* 473 F. Supp. 586, 600 (D. Md. 1979).

before Congress when it passed Title III contained language that would have led to the result suggested by the Legal Counsel Division, but Congress did not adopt it. The most fundamental canon of statutory construction is that plain language should control, especially in the absence of contrary legislative history.[9] The Legal Counsel Division has not pointed to such contrary legislative history. Nor have we become aware of any.

Furthermore, although it is plain that in enacting Title III Congress was sensitive to the need to protect citizens' privacy interests, it does not follow from this alone that § 2516(1) must be read in the manner suggested by the Legal Counsel Division. The Senate Judiciary Committee report states that "[t]o assure the privacy of oral and wire communications, title III prohibits all wiretapping and electronic surveillance *by persons other than duly authorized law enforcement officers* engaged in the investigation or prevention of specified types of serious crimes, and only after authorization of a court order. . . ." (Emphasis added). S. Rep. No. 1097, 90th Cong. 2d Sess. 66 (1968). In other words, as long as the officers engaged in an interception are "duly authorized" to do so and Title III's other requirements are met, the purpose of protecting the legitimate privacy interests would be satisfied. Thus, the argument advanced by the Legal Counsel Division ultimately returns us to the initial question that is the subject of this opinion: may the FBI be "duly authorized" to participate in § 2516(1) interceptions when the interception is directed at an offense listed in that subsection, even though the FBI lacks general investigative responsibility for the offense? The "purposive" approach of the Legal Counsel Division's memorandum does not ultimately assist in answering that question.

Another argument might have been made to support the position of the Legal Counsel Division. Section 2516(1) specifically refers to the procedures in § 2518 governing orders authorizing interceptions, and § 2518(1)(a) states that an application must identify "the investigative or law enforcement officer" making the application for an interception. 18 U.S.C. § 2510(7) defines the term "investigative or law enforcement officer" to include "*any officer of the United States* or of a State or political subdivision thereof, *who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter*, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses . . . ." (Emphasis added.) It might be said that §§ 2518 and 2510(7), read together, contemplate that all officers covered by an application for an interception must be "empowered by law" *other than* § *2516(1)* to investigate an offense for which an interception authorization is sought.

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[9] A court interpreting a statute is bound by the " 'literal or usual meaning of its words' " unless this would lead to "'absurd results . . . or would thwart the obvious purpose of the statute.' . . ." *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978), quoting *Commissioner* v. *Brown*, 380 U.S. 563, 571 (1965). *See also Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979); *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 38 (1934), *quoted in Fedorenko* v. *United States*, 449 U.S 490, 514 (1981).

The weakness in this argument is that it simply presupposes its conclusion: it *assumes* that an "investigative or law enforcement officer" for purposes of § 2518 could not be, in the context of an interception under § 2516(1) directed at narcotics offenses, an officer of the FBI. That is, of course, the question to be answered. It cannot be resolved simply by stating conclusorily that § 2516(1) could not be read to empower the FBI to participate in court-approved interceptions directed at the offenses listed in it. As noted above, under § 2516(1)'s most natural reading it in fact *does* authorize the FBI to participate in court-approved interceptions directed at any of the offenses listed in it.

IV.

For all the reasons stated in this opinion, we do not read § 2516(1) to require the FBI to have general investigative responsibility for an offense listed in that subsection before the FBI may be judicially authorized to participate in an interception directed at such an offense, including narcotics offenses. Accordingly, in the type of case that gave rise to your opinion request to this Office, we conclude that, under § 2516(1), the FBI may be judicially authorized to participate in a court-approved interception directed at an offense noted in that provision.

THEODORE B. OLSON
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The Legislative Veto and Congressional Review of Agency Rules

[The following testimony discusses the constitutional objections to legislative vetoes, which are grounded in principles of presentation, bicameralism, and separation of powers. The testimony also describes and responds to several theories advanced in support of the constitutionality of legislative vetoes. Finally, it outlines the Reagan Administration's policy objections to legislative vetoes in the broader context of congressional review of agency actions, and suggests alternative ways in which Congress may provide meaningful legislative oversight of executive action consistent with applicable constitutional principles.]

October 7, 1981

STATEMENT OF THEODORE B. OLSON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, BEFORE THE SUBCOMMITTEE ON RULES OF THE COMMITTEE ON RULES, UNITED STATES HOUSE OF REPRESENTATIVES

Introduction

Thank you for affording me the opportunity to appear before you today to discuss congressional review of agency rules and, in particular, legislative vetoes.

I hasten to acknowledge that there may be little that I can add to this Subcommittee's wisdom in this field. This Subcommittee performed a valuable service during the 96th Congress by holding extensive hearings on this topic. I may not be able to expand upon the wealth of material contained in the several volumes published on this subject by this Subcommittee last Congress.

I should note at the outset that I supplied testimony in this area last April to the Subcommittee on Agency Administration of the Committee on the Judiciary of the United States Senate. Rather than take your time with a repetition of the views expressed on that occasion, I am furnishing your Subcommittee with a copy of that testimony and ask that it be included as part of the record of today's hearing.

In my remarks today, I will expand upon this Administration's constitutional objections to legislative vetoes and discuss briefly the broader subject of congressional review of agency rules. Consideration of alternative methods of congressional review of agency actions, including rules, should not be deterred by concentration exclusively on the legislative veto. There are numerous techniques that may better serve the objectives of restraining and preventing agency or administrative abuses without deviating from fundamental constitutional requirements concerning the procedures by which Congress may legislate and the principle of the separation of powers.

As a preliminary matter, I would like to address two points. First, my testimony represents the position of the Administration concerning the constitutionality of legislative veto provisions. As a matter of policy, however, and as I will discuss in more detail later in my testimony, the Administration is not opposed to all congressional oversight devices. Without in any way diminishing its responsibility to challenge the constitutionality of such matters in the courts, in the legislative process the Administration may not necessarily oppose certain legislative oversight measures relative to selected "independent" agencies. The President might well decide to sign a bill containing such a proposal; indeed, every modern President has signed similar laws in the past. However, the Administration would be compelled to oppose any legislative veto provision that applied to Executive Branch agencies under the direct supervision and control of the President.

Second, I would like to address the notion, mistaken in my view, that legislative vetoes present "liberal-conservative" issues. Characterization in this manner tends to confuse the debate, divert attention from the real concerns, and utterly misconstrue the nature of the relevent legal and policy considerations.

Legislative vetoes implicate two general areas of constitutional concern: (1) how laws are created and (2) how the power to execute laws is allocated under our Constitution. It is neither accurate nor illuminating to characterize concern for the principles that laws may only be created by the affirmative votes of both Houses of Congress and the concurrence of the President or a congressional override of his veto as "liberal" or "conservative." Moreover, the elaboration of constraints placed by the principle of separation of powers on the Executive or Legislative Branches is not, and in rational terms *cannot,* be analyzed in terms of considerations that usually are viewed as "conservative" or "liberal." Neither end of the political spectrum has an exclusive claim to the conviction that the executive power is vested by the Constitution in the President.

There is obviously a great deal more than partisanship involved in opposition to a technique by Presidents ranging from Roosevelt, Truman, Kennedy, and Johnson to Hoover, Eisenhower, Nixon, and Ford. I do not believe that either "liberal" *or* "conservative" leanings prompted one of my predecessors, then Assistant Attorney General, now Supreme Court Justice William Rehnquist, to refer to legislative vetoes as "clearly . . . a violation of the separation of powers." [1] The same may be said of a 1977 American Enterprise Institute-sponsored study which stated that the legislative veto device "is, almost necessarily, unconstitutional." [2]

Partisan labeling of this issue simply does not promote analysis or understanding. The issue must be approached and addressed from the dual standpoints of how a particular legislative veto might rearrange the manner in which laws are created—either without participation by the President or without both the President and some portion of the Congress—and the extent to which a particular form of legislative veto might revise the President's constitutional responsibility to enforce and administer the laws that Congress enacts.

With this background in mind, I would like to turn to an analysis of the constitutionality of legislative vetoes.

I. The Legislative Veto

Because the term "legislative veto" has been used to describe a wide range of congressional oversight techniques, it is analytically useful to provide a definition of the term. It is a statutory provision under which Congress, or a unit of Congress, is purportedly authorized to adopt a resolution that will impose on the Executive Branch a specific requirement to take or refrain from taking an action. A key characteristic of all legislative veto provisions is that a resolution pursuant to such a provision is not presented to the President for his approval or veto. Such a provision contemplates a procedure under which one or both Houses of Congress or a committee of one House may act contrary to the constitutional procedure for enacting laws to overrule, reverse, revise, modify, suspend, prevent, or delay an action by the President or some other part of the Executive Branch.

The two-House legislative veto consists of both Houses acting affirmatively by concurrent resolution (as in the case of motor vehicle safety standards, 15 U.S.C. § 1410(d) (1976)). A variation is the active involvement by one House of Congress and the passive acquiescence or failure to disagree by the other House—which is termed a "one-and-one-half House" legislative veto (as in S. 890, 97th Cong., 1st Sess. (1981), the proposed Regulatory Reduction and Congressional Control Act of 1981). A legislative veto provision may provide for a veto by one House of Congress (as in the Federal Pay Comparability Act of 1970, 5 U.S.C. § 5305(c)(2) (1976), or in the Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. § 1403(b) (1976)), or by one committee of one House of Congress (as in the case of the Federal

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[1] Address by William H. Rehnquist, "Committee Veto: Fifty Years of Sparring Between the Executive and Legislature" 9–10 (Aug. 12, 1969) (Speech before the Section on Administrative Law of the American Bar Association).

[2] J. Bolton, The Legislative Veto: Unseparating the Powers 49 (1977).

Land Policy and Management Act of (1976), 43 U.S.C. § 1714(e) (1976)). Legislative veto provisions are contained in statutes dealing with rulemaking by Executive Branch departments and agencies (for instance, rulemaking by the Department of Education, 20 U.S.C. § 1232(d) (1976 & Supp. IV 1980)), as well as with rulemaking by "independent" agencies and commissions (for instance, rulemaking by the Federal Trade Commission, in view of § 20 of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 57a-1 (Supp. IV 1980)). They also are contained in legislation under which Executive Branch officials are called upon to execute the law in particular cases—for instance, when the Attorney General suspends the deportation of an alien, 8 U.S.C. § 1254 (1976 & Supp. IV), when the President approves execution of an agreement with another nation for atomic energy cooperation, 42 U.S.C. § 2153(d) (Supp. IV 1980), or when the National Railroad Passenger Corporation seeks to alter Amtrak's basic route system, 45 U.S.C. § 564(c) (1976 & Supp. IV 1980).

A. Constitutional Defects

For purposes of constitutional analysis, all of the types of legislative vetoes that I have outlined share two substantial infirmities. First, because they do not provide for presentation to the President of a resolution purporting to bind the Executive Branch, they violate the constitutionally mandated procedures for legislative action set forth in the Presentation Clauses of Article I, § 7, clauses 2 and 3. A related defect of legislative veto provisions other than two-House vetoes is that they violate the constitutional principle of bicameralism, under which all exercises of the legislative power having binding effect on the Executive Branch must first involve passage of a resolution or bill by both Houses of Congress—not just one House or one committee—before presentation to the President. This is also a requirement of Article I, § 7, clauses 2 and 3.

Second, since legislative vetoes would allow the Legislative Branch (or some unit of it) to substitute its judgment about how best to execute the law for the discretion of the Executive Branch, legislative veto provisions violate the underlying constitutional principle of the separation of powers, under which the Legislature is to legislate and the Executive is to execute the law.

I will discuss these constitutional defects in turn.

1. Article I, § 7

(a) The Presentation Clauses

A resolution adopted pursuant to a legislative veto provision is necessarily an exercise of Congress' Article I power to take legislative action. Article I is the source of Congress' power to impose legal requirements on the Executive Branch. As noted earlier, while some forms of legislative vetoes apply to purely executive actions, Congress simply may not execute the law. That power is given to the President. Article II, § 1, clause 1 states that executive power "shall be vested in [the] President." With certain express exceptions (*e.g.*, the Senate's advice and consent regarding presidential appointments), when Congress acts, it is exercising its legislative powers.

However, the Constitution did not leave it to the discretion of Congress to decide *how* it will exercise its legislative power. Specific procedures must be followed as prescribed in Article I, § 7, clauses 2 and 3. Article I, § 7, clause 2 provides that every "bill" "before it become[s] a Law" shall have been passed by both Houses of Congress and shall have been presented to the President for his approval or veto. If the President disapproves of a "bill" and vetoes it, the bill may still become law if it is re-passed by a two-thirds vote of both Houses of Congress.

The Framers anticipated and closed the "loophole" that might have been thought to exist under clause 2 which might, standing alone, have been perceived to have allowed Congress to avoid the presentation requirement by legislating in the form of resolutions rather than "bills." They added to the text of the Constitution Article I, § 7, clause 3, which provides in language that in many respects tracks clause 2, that "[e]very Order, Resolution, or Vote" requiring concurrent action (except resolutions of adjournment) [3] "shall be presented to the President," who may approve or veto the order, resolution, or vote. Like clause 2, clause 3 provides that after a proposal is vetoed, it may still become law if it is subsequently passed by a two-thirds vote of both Houses of Congress. Thus, clause 3, read in conjunction with clause 2, makes quite plain that the Framers intended that all exercises of legislative power having the substantive effects of legislation, irrespective of the form of congressional action, must follow the specified legislative procedure.[4]

Clauses 2 and 3 demonstrate that the Framers intended that all exercises of legislative power must follow the required process, which includes *passage* by both Houses of Congress and then *presentation* to the President.[5] As one commentator noted, "[i]t would be difficult to conceive of language and history which would more clearly require that all concurrent action of the two Houses be subject to the President's approval or veto."[6] Legislative veto provisions fall short of compliance with these requirements in that they do not permit the President to exercise his power to approve or veto a legislative veto resolution.

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[3] Article I, § 5, clause 4 prevents adjournment for more than 3 days without the consent of each House. Because such adjournments thus must be accomplished by concurrent action, a specific proviso in Article I, § 7, clause 3 was necessary to prevent Congress from having to submit adjournment resolutions to the President. It would be inappropriate for Congress to have to present adjournment resolutions to the President for his approval or veto since the President is able to convene Congress in any event. *See* Article II, § 3; S. Rep. No. 1335, 54th Cong., 2d Sess. 6 (1897).

[4] The history of the adoption of clauses 2 and 3 confirms that conclusion. During the debate on the presidential veto provision, James Madison observed that

> if the negative of the President was confined to *bills*, it would be evaded by acts under the form and name of resolutions, votes [etc. He] proposed that "or resolve" should be added after "*bill*," . . . with an exception as to votes of adjournment [etc.]. (Emphasis in original.)

5 J. Elliot, Debates on the Adoption of the Federal Constitution, 431 (1876). Although Madison's proposal was initially rejected, it was renewed during the following day's session by Mr. Randolph, who put the proposal in a new form substantially as it now appears. It was then adopted by a 9 – 1 vote. 2 M. Farrand, Records of the Federal Convention of 1787, 304–08 (rev. ed. 1937).

The presentation requirement is critical to our constitutional scheme of government. The separation of powers that distinguishes our Constitution is counter-weighted with a system of checks by each branch over the other two. The President's power to approve or veto actions of Congress is absolutely necessary to the preservation of the Presidency and to the system of checks and balances. *See* The Federalist, Nos. 48 & 73 (J. Madison & A. Hamilton) (J. Cooke ed. 1961); 2 M. Farrand, Records of the Federal Convention of 1787, 299–300, 586–87 (rev. ed. 1937). The Constitution's Framers feared that, absent a presidential veto, "the legislative and executive powers might speedily come to be blended in the same hands." The Federalist No. 73, at 494 (A. Hamilton) (J. Cooke ed. 1961). The Framers also believed that the President's veto power could operate on behalf of the public interest to protect against the effects of special interests in our public life. *See* The Federalist No. 73, *supra*. Without the veto power, as Alexander Hamilton observed, the President "would be absolutely unable to defend himself against the depredations of the [Legislative Branch]. He might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote."[7]

Legislative veto provisions purport to authorize congressional resolutions that change the law without being subject to the presidential veto. They circumvent one of the President's most important constitutional powers—in a sense, his only defense. They are therefore not constitutionally permissible.

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[5] Exercises of legislative power having the substantive effect of legislation and subject to the procedures of Article I, § 7 are distinguishable from: (1) acts that may be taken by one or both Houses of Congress or their committees because they are merely in aid of Congress' legislative power and do not purport to bind the Executive Branch, such as investigations, oversight hearings, or requests for information from the Executive Branch; and (2) acts by one or both Houses of Congress expressly authorized by a constitutional provision that does not require the procedures in Article I, § 7. The latter class of actions includes the power of the House of Representatives to impeach (Article I, § 2, clause 5); the Senate's power to try all impeachments (Article I, § 3, clause 6) and to ratify treaties and pass upon presidential nominations (Article II, § 2, clause 2); the power of both Houses to pass a concurrent resolution of adjournment that is not presented to the President (Article I, § 7, clause 3); and the power of each House to establish rules governing its own proceedings (Article I, § 5, clause 2). *See also* Article V and *Hollingsworth* v. *Virginia*, 3 U.S. (3 Dall.) 378 (1798) (power of both Houses by a two-thirds vote to propose constitutional amendments). In addition, of course, one or both Houses of Congress can employ a resolution as a means of expressing an opinion of the House that purports to have no binding effect on the Executive Branch.

[6] Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569, 573 (1953).

[7] The Federalist No. 73, at 494 (A. Hamilton) (J. Cooke ed. 1961).

The argument that legislative veto provisions directed at agency rules do not contemplate the exercise of legislative power does not survive a straightforward analysis. Typically, Congress delegates rulemaking authority to an agency to implement policy objectives mandated by statute. Agency regulations adopted pursuant to such an authorization have the force and effect of law if they are within the substantive delegation of the rulemaking power. *See, e.g., Chrysler Corp.* v. *Brown,* 441 U.S. 281, 295–96 (1979). Such a statutory delegation, which requires the concurrence of both Houses of Congress and presentation to the President, may be withdrawn or modified only by following the same procedure for legislation. In contrast, a legislative veto provision would erect a fundamentally different scheme. It would allow Congress—whether two Houses, one House, or otherwise—to overrule or block a rule or decision by the Executive Branch that had been issued pursuant to statutory authorization. The effect would amount to repealing or partially modifying the prior statutory authorization without following the prescribed process of presenting to the President resolutions having a public, legally binding effect.[8] Hence, the resolutions constitute legislative actions and, to be constitutional, they must be presented to the President for his concurrence or veto.

(b) The Bicameralism Principle

Legislative vetoes that contemplate action by Congress without affirmative approval by *both* Houses of Congress also violate the Constitution's bicameralism principle. This principle, like the presentation requirement, is embodied in Article I, § 7, clauses 2 and 3. These two clauses, which I have already discussed, require that any measure that has the effect of an exercise of legislative power, whether in the form of a bill, resolution, or otherwise, must be affirmatively *approved by both Houses of Congress.*[9] This conclusion is buttressed by the language of Article I, § 1, which vests "[a]ll legislative Powers herein granted" in "a Congress of the United States, which shall consist of a Senate *and* House of Representatives" (emphasis added).

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[8] Because under most forms of legislative veto devices, such rules go into effect (subject to judicial review) without any further action by Congress, it cannot plausibly be argued that such rules constitute mere "proposals" or "recommendations," the veto of which does not affect the legal "status quo."

[9] *See* S. Rep. No. 1335, 54th Cong., 2d Sess. 1–2, 6–8 (1897). Any suggestion that by assigning "veto" power to one House, rather than both, Congress may avoid the strictures of Article I, § 7, clause 3 would appear to be a constitutional absurdity. *See* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive,* 63, Calif. L. Rev. 983, 1066 n.428 (1975) (it "verges on irrationality to maintain that action by concurrent resolution, whereby Congress is at least held in check by its own structure, is invalid because the veto clause so states, but that the invalidity of a simple resolution, wherein a single House acts without check, is more in doubt"). As another commentator put it: "It surely must be true that a power not permitted to both houses of Congress by the Constitution cannot suddenly be made available by delegating it to one house." J. Bolton, The Legislative Veto: Unseparating the Powers, 39 (1977).

The bicameralism principle of Article I, § 7 contemplates actual *passage* of a resolution by both Houses—not mere passive "acquiescence" by one of the two Houses with respect to the action of the other House. Legislative veto provisions that contravene this bicameralism principle are invalid for that reason alone.

2. The Principle of the Separation of Powers

The additional constitutional defect of legislative veto provisions is that, to the extent that they permit Congress to reserve to itself powers vested by the Constitution in the Executive and Judicial Branches, they violate the principle of the separation of powers. This principle, one of the two or three most fundamental premises that underlie our Constitution, is directly reflected in the Constitution's structure, which establishes the three branches of government in Articles I, II, and III, for the purposes of legislating, executing the laws, and adjudicating, respectively. It also is reflected in several other provisions, including Article I, § 7, clauses 2 and 3 (the Presentation Clauses); Article I, § 6, clause 2 (the Ineligibility and Incompatibility Clause); and Article II, § 2, clause 2 (the Appointments Clause). *See generally Buckley* v. *Valeo,* 424 U.S. 1, 120–37 (1976).

The principle of the separation of powers is based on the premise that if one branch of government could, on its own initiative, merge legislative, executive, or judicial powers, it could easily become dominant and tyrannical. In such a circumstance, it would not be subject to the checks on governmental power that the Framers considered a necessary protection of freedom. *See* The Federalist Nos. 47 & 73 (J. Madison & A. Hamilton) (J. Cooke ed. 1961). The three branches of government are not "watertight compartments" acting in isolation of each other. *Springer* v. *Government of the Philippine Islands,* 277 U.S. 189, 211 (1928) (Holmes, J., dissenting); *see Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Rather, the Framers conceived of national government as involving the dynamic interaction between the three branches, with each "checking" the others and "balancing" the powers conferred on the others with its own assertions of power. At the core of this concept is the precept that no single branch can usurp or arrogate to itself the essential functions of the other branches.

The Framers realized that "[i]n republican government, the legislative authority, necessarily, predominates." The Federalist No. 51, at 350 (J. Madison) (J. Cooke ed. 1961). One of their major concerns was to ensure that this most powerful branch of government did not become too powerful. "[I]t is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions." The Federalist No. 48, at 334 (J. Madison) (J. Cooke ed. 1961). The Framers knew, as Blackstone had observed, that "[i]n all tyrannical governments, the supreme magistracy, or the right both of *making* and *enforcing* the laws, is vested in one and the same man, or one and the same body of men." 1 W. Blackstone, Commentaries 146 (Cooley 4th ed., 1899) (emphasis in original). Madison observed that the accumulation of legislative, executive, and judicial power in one department was "the very definition of tyranny." The Federalist No. 47, at 324 (J. Madison) (J. Cooke ed. 1961). He cited Montesquieu for the proposition that " 'there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.' " *Id.* at 325. Precisely in order to prevent such an accumulation of power, the Constitution was structured so that "[t]he magistrate in whom the *whole* executive power resides cannot of himself make a law, though he can put a negative on *every* law" and "[t]he entire legislature . . . can exercise *no* executive prerogative. . . ." *Id.* at 326 (emphasis added).

The boundary between legislative and executive action is set in the first instance by Congress when it decides how much discretion to delegate to the Executive Branch in implementing policies established by statute. Once such an authorization is enacted, however, the implementation of the statutory policies is an executive function. Indeed, it is the *core* of the Executive Branch's function. The statute sets a boundary beyond which the Executive Branch may not go without intruding on the legislative function. It similarly sets a boundary within which the Executive must be allowed to function without congressional vetoes or requirements except as adopted through the constitutional process of legislation. If it were otherwise, Congress would be able to arrogate to itself the essence of the Executive's function. In that circumstance, there would be no place for the Executive as a separate, co-equal branch of government.

This principle is violated by legislative veto provisions to the extent that they would give to the Houses of Congress or even committees of Congress the power to intervene, apart from the passage of legislation, directly in the process by which the Executive Branch executes the law in particular cases or by rulemaking. They would effectively transform executive decisions into tentative actions, rather like those of congressional committees, having no force and effect of their own but merely achieving legal status if Congress, for example, does not disapprove them. In essence, a legislative veto of agency rules would set up the Houses of Congress as final *administrative* authorities over the whole range of regulatory matters. Legislative vetoes of purely executive decisions take the power from the Executive Branch and vest it in the Congress just as surely as if the President were simply an advisory official, suggesting proposed actions to Congress. This system might be what some may prefer, but it is not the system that our Constitution created.

It must be conceded that there have been abuses of power by Executive Branch agencies. Congress is properly disturbed when an agency exceeds the limits on its discretion or ignores the manifest will of the Legislature. But in our system, the Judiciary, not Congress, corrects such abuses absent the adoption of plenary legislation. As members of this Subcommittee repeatedly have observed, it is your right and your responsibility to set policies and to insist that the policies you established will be implemented. However, as Justice Brandeis noted, the doctrine of the separation of powers was adopted ". . . not to promote efficiency but to preclude the exercise of arbitrary power . . . not to avoid friction, but . . . to save the people from autocracy." *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

B. Responses to Proponents of Legislative Vetoes

I would like to respond briefly to the major rejoinders by those who support legislative veto provisions and believe that they are not unconstitutional.

First, although some argue otherwise, there is no meaningful constitutional distinction to be drawn between legislative vetoes of rulemaking and of other types of agency action. Rulemaking is a form of executive action. *See Buckley* v. *Valeo*, 424 U.S. at 140–41. Like other such actions, it is lodged in the Executive Branch under Article II of the Constitution. The distinction between rulemaking and other forms of executive action carries no weight with respect to compliance with the constitutionally prescribed procedure for the exercise of legislative power. Article I, § 7, clauses 2 and 3 specify the process to be followed by *all* legislative action having the force of law and not otherwise covered by constitutional sections specifically providing for a different procedure, regardless whether the action affects rulemaking, adjudication, or other decisions by agencies.

Second, it has been argued that the adoption of a resolution disapproving an agency rule pursuant to a legislative veto provision is not really an exercise of legislative power and is not therefore subject to the constitutional provisions that I have described, but rather is the exercise of a condition on agency discretion under a statute giving the agency rulemaking power in the first place. Viewed in that light, original grants of rulemaking discretion to agencies in organic statutes would be changed by amendments containing legislative veto provisions to "conditional delegations." The analogy is to grants of statutory power made contingent upon findings of fact by an Executive Branch officer, or upon the favorable vote of persons who will be affected by proposed governmental action. *See* H.R. Rep. No. 120, 76th Cong., 1st Sess. 6 (1939). Such an argument is, in the first instance, semantic in that it presupposes that affixing another label to the final act of the legislative body which determines what the law will or will not be can render it not an exercise of legislative power. That supposition simply exalts the label over the reality of what is occurring. Moreover, the fatal analytical deficiency in this argument is that it assumes that the delegation of power to a person or entity outside the Legislative Branch is constitutionally equivalent to the delegation of power to the Houses of Congress, which are within the Legislative Branch and thus subject to the strictures of Article I. That assumption is insupportable. The Framers of our Constitution did not want Congress to have the power that they gave to the Executive. Whenever power is vested outside Congress, it is not concentrated within it. The undue concentration of power *in* Congress is what the separation of powers is specifically designed to avoid. Hence, a provision allowing persons or bodies outside Congress to determine whether conditions on the exercise of delegated authority have been met does not present the same constitutional separation of power questions that vesting such power within Congress raises.

The other deficiency in the "conditional delegation" argument is that if carried to its obvious and natural extreme, it would allow a single member of Congress to be authorized to veto any or every executive action—an obvious absurdity.

Third, it is no response to the constitutional objections to legislative vetoes to assert that they are authorized by the Necessary and Proper Clause, Article I, § 8, clause 18, which grants Congress power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The exercise of Article I power by Congress pursuant to the Necessary and Proper Clause is limited by other express provisions of the Constitution, including Article I, § 7, clauses 2 and 3 and by the principle of the separation of powers. *See Buckley* v. *Valeo,* 424 U.S. at 135. As the United States Court of Appeals for the Ninth Circuit noted in *Chadha* v. *INS,* 634 F.2d 408, 433 (1980), petition for cert. pending No. 80-1832 (filed May 1, 1981), the Necessary and Proper Clause "authorizes Congress to 'make all laws,' not to exercise power in any way it deems convenient. That a power is clearly committed to Congress does not sustain an unconstitutional form in the exercise of the power."

C. Policy Objections

In addition to their serious constitutional defects, legislative vetoes are objectionable for a variety of other reasons. First, they do nothing to cure the root causes of regulatory excesses, duplication, or inefficiency, namely, broad, relatively standardless delegations to agencies. In fact, they have a natural tendency to encourage broader statutory delegations, for they provide the superficial reassurance that Congress may have a role in implementing a statute after it is passed and thus need not carefully define an agency's powers and limits before the law is enacted. The result of overbroad delegation is excessive agency discretion that could not possibly be monitored carefully by Congress.

Legislative vetoes also have been said measurably to increase the amount of behind-the-scenes negotiation between agencies and committee staffs and single members of Congress to the detriment of a public, fully accountable administrative process.[10] In addition, many veto provisions foster delay, for even though only few rules or actions would likely be vetoed, all matters referred to Congress would be subject to deferral and uncertainty.

To the extent that legislative vetoes may be passed by less than two Houses of Congress, they undermine the accountability of all members of Congress for actions of Congress. They thus encourage the tendency of decentralization of power within Congress to the detriment of the body as a whole. Furthermore, to the extent that Congress as a body does get seriously involved in reviewing rules or other executive actions subject to legislative vetoes, Congress predictably will get hopelessly mired in details. As Jefferson wrote:

> Nothing is so embarrassing nor so mischievous, in a great assembly, as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over, the files of Congress; he will observe the most important propositions hanging over, from week to week, and month to month, till the occasions have passed them, and the things never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small subjects . . . .[11]

In short, legislative vetoes do not solve the problems of administrative excess that they are intended to correct, and they have several policy infirmities of their own.

II. Congressional Review of Agency Action in General

Although the Administration believes that legislative veto provisions are unconstitutional and is taking that position in pending litigation,[12]

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[10] *See* Bruff and Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes,* 90 Harv. L. Rev. 1369, 1409–14 (1977).

[11] 6 T. Jefferson, The Writings of Thomas Jefferson 228 (A. Bergh ed. 1903) (letter to E. Carrington, Aug. 4, 1787).

[12] Among the pending cases are *Immigration and Naturalization Service* v. *Chadha,* petition for cert. pending No. 80–1832 (filed May 1, 1981), in which the Department of Justice has filed a Jurisdictional Statement in the Supreme Court on behalf of the Immigration and Naturalization Service; *Consumer*

Continued

we would stress that there are many full constitutional legislative and oversight mechanisms that Congress can use to achieve the goals of more effective review of executive action, including rules. In organic statutes, Congress can—and undoubtedly should—place specific and precise limits on the authority of agencies to issue rules. Moreover, Congress always can override unwise, inappropriate, burdensome, or excessive agency rules with legislation. To the extent that procedural hurdles within Congress impeding the enactment of legislation have fostered legislative veto proposals, Congress can adopt legislation assuring early floor consideration of bills overturning agency rules.

Congress also can authorize an agency to act for a limited period of time, thereby forcing the agency to return to Congress for authority to continue to act when its authorization expires. Congress can hold oversight hearings, at which explanations for agency rules that members of Congress may question can be sought and made part of a public record. Congress can adopt resolutions expressing its views that, while not legally binding upon the Executive Branch unless adopted pursuant to the plenary legislative process, can guide an agency in its implementation of the law. Further, Congress has authority to appropriate the money with which agencies execute the law. In appropriations statutes, Congress can provide for limitations on the expenditure of funds for certain purposes consistent with other applicable legal requirements.

Another alternative is one that I understand originated in this Subcommittee last year. It is the proposal to create a Select Committee on Regulatory Affairs that would be given broad jurisdiction over the rulemaking activities of the federal government. By virtue of its broad jurisdiction, such a committee could investigate issues of regulatory

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Energy Council of America v. *Federal Energy Regulatory Commission*, Nos. 80-2184, 80-2312, argued on September 10, 1981, before a panel of the United States Court of Appeals for the District of Columbia Circuit; and *Pacific Legal Foundation* v. *Watt*, No. 81-141, and *Mountain States Legal Foundation* v. *Watt*, No. 81-168, two cases consolidated in the United States District Court for the District of Montana.

The only federal court yet to reach the issue of the constitutionality of "legislative veto" devices other than the United States Court of Appeals for the Ninth Circuit in *Chadha* v. *INS*, 634 F.2d 408 (1980), is the United States Court of Claims in *Atkins* v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1978). The 4–3 holding of the Court of Claims in that case was narrowly restricted to the context of the Federal Salary Act of 1967, 2 U.S.C. § 359(1)(B)(1970). *See* 556 F.2d at 1059. Three of the seven judges forcefully disagreed with the *per curiam* opinion on the legislative veto device under consideration there. *Cf. Buckley* v. *Valeo*, 424 U.S. 1, 140 n.176 (1976) (declining to address the question of the validity of a one-House "legislative veto" provision in the Federal Election Campaign Act of 1971, 2 U.S.C. § 438(c) (Supp. IV 1980), an issue not briefed by the United States); 424 U.S. at 257 (White, J., concurring in part and dissenting in part) (concluding that the "legislative veto," at least as applied to so-called "independent agencies," is not a usurpation of the President's constitutional power); *McCorkle* v. *United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied* 434 U.S. 1011 (1978) (declining to reach the issue of the constitutionality of the same provision of the Federal Salary Act that was at issue in *Atkins* v. *United States*, *supra*, on the ground that the provision was not "severable" from the rest of the statute and, therefore, even if the statute were held unconstitutional, plaintiff would have no right to additional pay); *Clark* v. *Valeo*, 559 F.2d 642 (D.C. Cir.) (*en banc*), *aff'd mem. sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977) (declining to consider the constitutionality of the "legislative veto" provision of the Federal Election Campaign Act on the ground that the issue was not ripe for adjudication), 559 F.2d at 678 (MacKinnon, J., dissenting) (concluding that the legislative veto provision is unconstitutional).

overlap and duplication that presently prove difficult for standing committees to address.

The common themes underlying these several alternative methods by which Congress actively can review agency rules is that they do not displace the President and the Executive Branch in the execution of the law. They respect the principle of the separation of powers, as well as the presentation and bicameralism principles that apply to exercises of legislative power.

There should be no doubt regarding this Administration's concern about excessive and abusive agency actions. Indeed, the Administration has taken numerous steps to assure that agency rules are carefully considered and limited in the manner provided by Congress. If further oversight is necessary, we would support the use of joint resolutions providing for consideration by both Houses of Congress, presentation to the President, and a congressional override of any presidential veto in the rare case in which it might occur. Such a method would include in the process all of the major elected officials in the national government. As you know, the President shares your concern that the costs and burdens of government must be diminished. Any mutual attempts to achieve this objective that do not strip the President of his constitutional power would be welcomed.

Conclusion

We respect the views of those members of Congress who disagree with us on the constitutional questions and we join in their desire for a reasonably prompt resolution of this dispute in the courts. In the meantime, we urge restraint against proposals that tend to rearrange the powers which our forefathers so carefully distributed among the three branches.

The debate over legislative vetoes and alternative ways for Congress to oversee agency rules must be viewed in terms of the most basic structural underpinnings of our system of government—checks by the legislature upon itself; the principle of bicameralism; checks by the President on the Congress in the form of presentment of legislation to him for veto or approval; and the separation of powers between Congress and the Executive Branch. The temptation to vest greater power in Congress and to exercise greater control over the Executive Branch should not provide the excuse for a major structural rearrangement in violation of these principles.

Each branch seems inclined to rectify perceived abuses in the other two by expediencies that the Constitution will not tolerate. We must be ever mindful that the genius that created the precious system which has preserved our freedom for nearly 200 years expressly eschewed remedies for temporary problems that pave a path for excessive domination by one branch of government.

Congressional Disapproval of AWACS Arms Sale

The provision in § 36(b) of the Arms Export Control Act for congressional disapproval by concurrent resolution of a proposed sale of military equipment is unconstitutional under the Presentation Clauses of the Constitution; since a resolution of disapproval under § 36(b) has the force and effect of law, the President must be given the opportunity to approve or veto such congressional action.

The legislative veto in § 36(b) impermissibly intrudes on the President's authority to execute the laws and to conduct the Nation's foreign relations, in violation of the principle of separation of powers.

The legislative veto in § 36(b) is severable from the other provisions of the Arms Export Control Act, since nothing in the legislative history of that Act indicates an intent to deprive the President altogether of his power to transact foreign military sales.

The "report-and-wait" provision in § 36(b), which requires that the President report arms sales to the Congress and delay the transaction for a 30-day period pending congressional action to disapprove the sale through the enactment of legislation, is not unconstitutional.

The President could, consistent with the longstanding position of the Executive Branch and with the express statements of his two immediate predecessors, choose to treat a congressional resolution of disapproval under § 36(b) as a legal nullity. Alternatively, the President could avoid the necessity to submit a proposed arms sale for congressional review by invoking the emergency provision of § 36(b), or by making a finding that the sale is vital to the national security interests of the United States under the International Security and Development Cooperation Act of 1980.

October 28, 1981

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

On October 1, 1981, the President transmitted to Congress a certification of intent to offer certain military equipment, including Airborne Warning and Control System (AWACS) aircraft, to the government of Saudi Arabia. Section 36(b) of the Arms Export Control Act, 22 U.S.C. § 2776(b) (1976 and Supp. IV 1980), provides that the letter of offer shall not be issued "if the Congress, within thirty calendar days after receiving such certification, adopts a concurrent resolution stating that it objects to the proposed sale." The House of Representatives has already voted to disapprove the sale, and there is significant possibility that the Senate will also adopt a resolution of disapproval. This memorandum discusses several theories under which we believe the President could sell the equipment to Saudi Arabia notwithstanding the adoption by Congress of a concurrent resolution disapproving the sale.

I. Constitutional Invalidity of the Legislative Action

This Administration, like all previous administrations since 1934, has taken the position that so-called legislative vetoes which interfere with the President's constitutional responsibilities are unconstitutional. We believe that § 36(b) is such a provision. It purports to authorize congressional action having the force and effect of legislation without providing for presentation to the President for his approval or veto, as required by Article I, § 7, clauses 2 and 3 of the Constitution. Moreover, § 36(b) represents a particularly severe congressional intrusion into the prerogatives vested in the President by the Constitution to execute the law and to conduct the Nation's foreign relations.

For these reasons, we believe that the President would have discretion to proceed with the proposed sale despite a congressional veto. Of course, the President could, as a matter of policy, determine not to issue the letter of offer in view of the congressional expression of disapproval.

A. History of § 36(b)

Every President who has commented on § 36(b) has strongly opposed its provision for a congressional veto of arms sales to foreign governments. The Foreign Military Sales Act of 1968, Pub. L. No. 90-629, 82 Stat. 1320, gave the President broad discretion to sell defense articles and services to friendly countries for their internal security, self-defense, and other needs. There was no provision for congressional disapproval of proposed sales. The predecessor of § 36(b) was first enacted in 1974 as part of omnibus foreign assistance legislation. Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 45, 88 Stat. 1795, 1814. President Ford signed the legislation without commenting on the congressional disapproval provision. 11 Weekly Comp. Pres. Doc. 3 (Dec. 30, 1974).

Two years later, President Ford vetoed a bill re-enacting the amendment, modifying it in several minor respects, and incorporating further legislative veto provisions. President Ford stated that the congressional veto provisions of the bill would erode "the basic distinction between Legislative and Executive functions":

> Such legislation would pose a serious threat to our system of government, and would forge impermissible shackles on the President's ability to carry out the laws and conduct the foreign relations of the United States. The President cannot function effectively in domestic matters, and speak for the nation authoritatively in foreign affairs, if his decisions under authority previously conferred can be reversed by a bare majority of the Congress. Also, the attempt of Congress to become a virtual co-administrator

> in operational decisions would seriously detract it from its proper legislative role. Inefficiency, delay, and uncertainty in the management of our nation's foreign affairs would eventually follow.

12 Weekly Comp. Pres. Doc. 828, 829 (May 7, 1976).

Thereafter, when Congress presented to him a revised version of the bill which eliminated several congressional veto provisions, President Ford signed it into law but specifically stated his reservations about the remaining veto provision in § 36(b). The President stated:

> I am especially pleased to note that with one exception the constitutionally objectionable features of [the bill], whereby authority conferred on the President by law could be rescinded by the adoption of a concurrent resolution by the Congress, have all been deleted. . . . The manifest incompatibility of such provisions with the express requirements of the Constitution that legislative measures having the force and effect of law be presented to the President for approval, and if disapproved, be passed by the requisite two-thirds majority of both Houses was perhaps the single most serious defect of the previous bill and one which went well beyond security assistance and foreign affairs in its implications. Moreover, such provisions would have purported to involve the Congress in the performance of day-to-day executive functions in derogation of the principle of separation of powers, resulting in the erosion of the fundamental constitutional distinction between the role of the Congress in enacting legislation and the role of the Executive in carrying it out.
>
> The one exception to this laudable action is the retention . . . of the 'legislative veto' provision regarding major governmental sales of military equipment and services. This is not a new provision, but has been in the law since 1974. To date, no concurrent resolution of disapproval under section 36(b) has been adopted, and the constitutional question has not been raised directly. Although I am accepting [the bill] with this provision included, I reserve my position on its constitutionality if the provision should ever become operative.

12 Weekly Comp. Pres. Doc. 1104, 1105 (July 1, 1976).

President Carter expressed similar views when an enrolled bill entitled the "International Security Assistance Act of 1977" was presented to him for signature. That bill amended the Arms Export Control Act to apply the § 36(b) veto procedure to certain other transactions and to add a congressional veto to third-party transfers. Pub. L. No. 95–92,

§§ 16, 20, 91 Stat. 614, 622, 623. President Carter stated that these provisions would:

> let Congress prevent Presidential action authorized under law simply by adopting a concurrent resolution of disapproval. Such provisions raise major constitutional questions, since Article I, § 7 of the Constitution requires that congressional action having the force and effect of law be presented to the President for approval. These provisions also have the potential of involving Congress in the execution of the laws, a responsibility reserved for the President under the Constitution. I am approving [the bill] because of its importance to our foreign relations and national security, but I must express my deep reservations about these two provisions and my intention to preserve the constitutional authority of the President.

13 Weekly Comp. Pres. Doc. 1185, 1186 (Aug. 5, 1977).

B. Constitutionality of the § 36(b) Procedure

The possible rejection by Congress of the President's decision to sell AWACS aircraft and other military equipment to the government of Saudi Arabia sets this controversy in a political, military, and diplomatic context. Nevertheless, the constitutional issues raised by § 36(b) are fundamentally similar in most respects to those raised by legislative vetoes attached to other grants of power. This Administration, like every previous administration since 1934, has taken the position that so-called legislative vetoes which impermissibly interfere with the power vested in the President by the Constitution are unconstitutional. We believe that the provision for congressional disapproval in § 36(b) is unconstitutional for two fundamental reasons.[1]

First, § 36(b) is unconstitutional under the Presentation Clauses of Article I, § 7, clauses 2 and 3 of the Constitution. These clauses require that all bills (clause 2) and other congressional actions having the force and effect of legislation (clause 3) must be presented to the President for approval. If the President approves such a measure, it becomes law; if he vetoes the measure by returning it with objections to its House of origin, it does not become a law unless two-thirds of each House votes to override the President's veto.

It is, we believe, incontrovertible that a resolution of disapproval under § 36(b) has the force and effect, even if not the traditional form, of legislation. The President is given statutory authority to negotiate arms sales with, and make delivery to, foreign nations. Disapproval of a proposed sale under § 36(b) would nullify the President's exercise of that authority as applied to a particular sale. Any congressional action disapproving a proposed sale has the function, the force, and the effect of legislation, because it narrows the discretion which Congress has previously vested in the President by statute. Section 36(b), however, does not provide the President with the opportunity to approve or veto such congressional action, as required by the Presentation Clauses. In requiring only a concurrent resolution for disapproval of a proposed arms sale, § 36(b) unconstitutionally infringes on the power to veto legislation vested in the President by Article 1, § 7, clauses 2 and 3. *See Chadha* v. *Immigration and Naturalization Service,* 634 F.2d 408, 421–35 (9th Cir. 1980), *cert. granted and jurisdiction postponed,* 454 U.S. 812 (1981).*

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[1] The constitutional objections discussed in this memorandum have been articulated in considerably greater detail in testimony furnished to Congress by this Administration by Assistant Attorney General, Office of Legal Counsel, Theodore B. Olson on April 23, 1981, and October 7, 1981, to the Subcommittee on Agency Administration of the Senate Committee on the Judiciary and the Subcommittee on Rules of the House of the House Committee on Rules, respectively.

Second, and equally fundamental, § 36(b) impermissibly intrudes on the President's authority to execute the laws and to conduct the Nation's foreign relations, in violation of the principle of separation of powers. Under our system of government, it is the function of Congress to legislate, as it has done in the present case by authorizing the President to negotiate and consummate military sales to foreign nations. It is equally the function of the Executive Branch to execute the laws which Congress has passed, as the President has done in the present case by negotiating the sale of AWACS aircraft and other military equipment to Saudi Arabia. Just as the President may not exercise the legislative power—for example, by taking actions outside the scope of statutory authorization or his inherent constitutional authority—so the Congress may not impermissibly intrude on the President's power to execute the law.

Section 36(b), however, purports to authorize Congress to act as a partner with the President in the statutorily authorized sale of arms to foreign nations. Not only is Congress a partner, but it is, in a sense, a superior of the President in this process, since the Congress has reserved to itself the purported authority to countermand an Executive Branch decision. While the separation of powers is not absolute or airtight, the type of arrogation of executive power contemplated by § 36(b) represents an impermissible intrusion on the constitutional prerogatives of the Executive Branch. *See Chadha,* 634 F.2d at 420–22.

The intrusion on executive prerogatives is particularly severe in the case of § 36(b) because of the special role of the President in conducting the Nation's foreign relations. While Congress has an important role to play in the foreign affairs context, as evidenced by the Senate's power to ratify treaties and the power of Congress to enact legislation bearing on foreign relations, it is the President who acts as the ultimate

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*Note: The Supreme Court's opinion in *Chadha* v. *INS* is printed at 462 U.S. 919 (1983). Ed.

spokesman for the Nation in the world community. *See generally Dames & Moore* v. *Regan,* 453 U.S. 654 (1981); *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 319 (1936). We do not suggest that the President's power to conduct foreign relations is so plenary as to disable the Congress from passing a statute—signed by the President or enacted over his veto—disapproving an arms sale. We do believe, however, that in his conduct of foreign relations the President must enjoy at least the full degree of discretion vested in him by legislation, without congressional interference with his performance of the delicate, and quintessentially executive, function of negotiating and consummating arms sales with foreign nations.

C. Severability

In light of our concludion that § 36(b) is unconstitutional insofar as it authorizes the Congress to enact a concurrent resolution disapproving a sale of military equipment or services which the President intends to carry out, it is necessary to consider whether the invalid part of § 36(b) is severable from other portions of § 36(b) or of the Arms Export Control Act generally. If the provisions are not severable, the other statutory requirements or authorizations might fall with the legislative veto provision of § 36(b). *Cf. McCorkle* v. *United States,* 559 F.2d 1258, 1260 (4th Cir. 1977), *cert. denied,* 434 U.S. 1011 (1978).

The question of severability is ultimately one of legislative intent. *Sloan* v. *Lemon,* 413 U.S. 825, 833–34 (1973). The legal standard is supplied by *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma,* 286 U.S. 210, 234 (1932): "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." This standard applies even in the absence of any express provision of severability. "The cardinal principle of statutory construction is to save and not to destroy." *Tilton* v. *Richardson,* 403 U.S. 672, 684 (1971) (quoting *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 30 (1937)).

We have carefully examined the relevant legislative history and have concluded that the legislative veto device in § 36(b) is severable from the remainder of that section and from the Arms Export Control Act generally. The President's power to sell military equipment and services to foreign nations has for many years been an important aspect of U.S. foreign policy. Prior to 1974, such sales were not subject to congressional disapproval. Although the enactment of a congressional disapproval provision in 1974 did evidence a congressional intent to exercise greater oversight and control of the President's decisions in this area, we have found nothing in the legislative history of the 1974 legislation or of subsequent legislation re-enacting and amending § 36(b) to indicate that Congress, in the absence of a congressional veto provision, would have deprived the President altogether of his power to transact foreign military sales. In light of the importance of foreign military sales to the conduct of the Nation's foreign relations, and in light of the alternative for guiding Executive Branch discretion available to Congress—most notably the "report-and-wait" provision also contained in § 36(b) [2]—we do not find the requisite evidence that Congress would have denied the President's authority to authorize foreign military sales were the legislative disapproval provision of § 36(b) held unconstitutional. For this reason, we conclude that the legislative veto provision of § 36(b) is severable from the other provisions of the legislation.

II. Emergency Provision

Section 36(b) expressly contemplates that in emergency situations the President may transact a foreign military sale without submitting to congressional review. The section provides:

> The letter of offer shall not be issued if the Congress, within thirty calendar days after receiving such certification, adopts a concurrent resolution stating that it objects to the proposed sale, unless the President states in his certification that an emergency exists which requires such sale in the national security interests of the United States. If the President states in his certification that an emergency exists which requires the proposed sale in the national security interest of the United States, thus waiving the congressional review requirements of this subsection, he shall set forth in the certification a detailed justification for his determination, including a description of the emergency circumstances which necessitate the immediate issuance of the letter of offer and a discussion of the national security interests involved.

22 U.S.C. § 2776(b)(1). We understand that the President did not include a finding of a national security emergency in his certification transmitted to Congress on October 1. Thus, to trigger this provision, it would be necessary for the President to resubmit his certification supplemented by the emergency findings required by §36(b). The legislative history of the emergency provision does not provide clear guidance on what situations could be considered emergencies or whether the President's determination could be challenged in Congress or in court. It is our opinion, however, that

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[2] We believe that the requirement in § 36(b) that the President report arms sales to the Congress and delay the transaction for a 30-day period pending congressional action to disapprove the sale through plenary legislation is constitutional. During this 30-day period, or indeed until a letter of offer is actually issued, Congress could take action to prevent the sale by enactment of legislation subject to the approval or disapproval of the President under Article I, § 7 of the Constitution.

the President enjoys virtually unlimited discretion to make an emergency determination, so long as he complies with the procedural requirements regarding including this determination in his certification and making detailed factual findings as specified. Once the President has made an emergency determination, it is our opinion that the sale could proceed immediately and could not be blocked by anything short of plenary legislation enacted by the Congress and signed by the President or passed over his veto. Moreover, we believe that the President's determination that an emergency exists for purposes of § 36(b) would not be reviewable in court. *Cf. Sardino* v. *Federal Reserve Bank of New York*, 361 F.2d 106, 109 (2d Cir. 1966), *cert. denied*, 385 U.S. 898 (1966) (courts will not review the President's determination that a national emergency exists, because such a determination is "peculiarly within the province of the chief executive.").

While this avenue of avoiding the necessity to submit proposed sales for congressional review and potential disapproval is available to the President as a matter of law, there may be sound reasons of policy to avoid use of the emergency provision. The President did not make an emergency finding when he initially submitted that certification to Congress on October 1; it may be difficult to argue that there has been any change in circumstances other than the fact of congressional disapproval. Moreover, the argument that an emergency exists could be met by the objections that (a) even if approved, the AWACS aircraft cannot be delivered and made fully operational for a substantial period of time; (b) Saudi Arabia may be able to obtain similar aircraft from other western nations if the AWACS sale is disapproved; and (c) there appears to be no imminent threat to Saudi Arabia or U.S. security interests in the region which has not existed for some time. However, these are matters of policy as to which we can offer no authoritative or fully informed opinion.

III. Consultation with Congress

The International Security and Development Cooperation Act of 1980, Pub. L. No. 96-533, § 47, 94 Stat. 3131, 3140, provides a third possible avenue for transacting the sale notwithstanding congressional disapproval. That statute provides, in pertinent part:

> The President may make sales, extend credit, and issue guarantees under the Arms Export Control Act, without regard to any provision of this Act, the Arms Export Control Act, any law relating to receipts and credits accruing to the United States and any Act authorizing or appropriating funds for use under the Arms Export Control Act, in furtherance of any of the purposes of such Act, where the President determines, and so notifies in writing the Speaker of the House of Representatives and

> the chairman of the Committee on Foreign Relations of the Senate, that to do so is vital to the national security interests of the United States.
>
> Before exercising the authority granted in this subsection, the President shall consult with, and shall provide a written policy justification to the Committee on Foreign Affairs and the Committee on Appropriations of the House of Representatives and the Committee on Foreign Relations and the Committee on Appropriations of the Senate.

Again, the President has not taken action to trigger this provision by providing written notification to the Speaker of the House of Representatives and the chairman of the Senate Foreign Relations Committee. The President would further have to "consult with" the specified congressional committee for an unstated period of time before the sale could be completed and would have to provide the required written policy justification. This section, we believe, rather clearly contemplates that the President, having taken these steps, could transact a foreign military sale notwithstanding any concurrent resolution of disapproval. It seems quite possible that the President could deem the required period of consultation with Congress to have been already fulfilled, or at least considerably foreshortened, by the extensive debates which have already occurred in the Congress on the arms package. Moreover, like the emergency provision of § 36(b), we believe that a presidential finding that a sale is vital to the national security interests of the United States would not be subject to judicial review.

This route may have certain advantages, as a matter of policy, over the emergency provision of § 36(b). While it may be rather difficult for the President to argue that an emergency exists now which did not exist on October 1, he might state with considerable justification that it has been the consistent, publicly held view of the Administration that the arms sale was vital to U.S. national security interests. Again, these considerations involve policy judgments as to which we are not able to offer authoritative or fully informed advice. That judgment can only be made by the President, in consultation with the Department of State and with other elements of the national security establishment.

IV. Conclusion

In summary, we have identified three theories under which the President could proceed with the sale of AWACS aircraft and other military equipment to the government of Saudi Arabia. First, the President could, consistent with the longstanding position of the Executive Branch and with the express statements of his two immediate predecessors, choose to treat the congressional resolution of disapproval as a legal nullity because it violates principles of separation of powers as embodied in the Presentation Clauses and in the executive function. Second, he could (if in his considered discretion such a judgment is possible) initiate procedures under the emergency exception to the congressional review provision of § 36(b). Third, he could initiate the consultation process contemplated by the International Security and Development Cooperation Act of 1980.

THEODORE B. OLSON
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Office of Legal Counsel

Ethical Issues Raised by Assistant United States Attorneys' Representation of Judges

A number of concerns are raised under the American Bar Association's canons of professional ethics when an Assistant United States Attorney (AUSA) is asked to represent a judge in his or her district in a suit brought by a private individual. These ethical concerns could be handled through disclosure of prior or pending representation to opposing counsel, by arranging to have the judge represented by an AUSA from another district, or by retaining private counsel to represent the judge.

November 2, 1981

MEMORANDUM TO THE COUNSEL, OFFICE OF PROFESSIONAL RESPONSIBILITY, DEPARTMENT OF JUSTICE

This responds to your request for our opinion on several questions raised by the United States Attorney for the Southern District of California, M. James Lorenz.[1] These questions center around the ethical problems raised when an Assistant United States Attorney (AUSA) appears before a federal judge whom he is defending or has defended in a suit in which the judge is charged with depriving an individual of his constitutional rights. *See* 42 U.S.C. § 1983.[2] On April 13, 1981, this and related problems, including that of representing a judge sued for actions taken while he was a federal officer but prior to his nomination to the bench, were raised at a meeting of the Advisory Committee for United States Attorneys held at the Department of Justice. In September, this Office received a letter from the United States Attorney in Puerto Rico, Raymond L. Acosta, outlining cases in which AUSAs represented judges who had been sued for their handling of administrative matters involving the district court.[3] We believe that the present system of representation for judges by AUSAs raises recurrent ethical concerns that should be addressed at the highest levels of the Justice Department. We suggest that your Office convene a meeting that would involve, at the least, the Executive Office for United States Attorneys, the Civil Division, and the Deputy Attorney General, in order to draw up a uniform policy that will eliminate, to the greatest extent possible, these ethical concerns.

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[1] We have solicited and received the views of the Civil Division on this question.

[2] Representation by the AUSA is authorized by the Department of Justice at the request of the Administrative Office of United States Courts. United States Attorneys' Manual, § 1-10.000 (1977).

[3] Letter from Raymond L. Acosta, United States Attorney for the District of Puerto Rico, to the Office of Legal Counsel, September 11, 1981 (Acosta Letter). For example, Mr. Acosta described one case in which his Office was simultaneously prosecuting a lawyer for trespass against the Navy and defending the entire district court from charges that the judge's refusal to admit the lawyer to the Puerto Rican bar was politically motivated.

I. Background

Most suits in which representation is requested appear to fall into the category outlined by Mr. Lorenz—the judge is sued for actions that are alleged to violate an individual's constitutional rights. Such cases will, we assume, be defended on the ground of absolute judicial immunity. Others, like Mr. Acosta's examples, arise in *Bivens*-type suits and mandamus actions stemming from administrative, rather than judicial, matters. These "demand more involvement on the part of the attorneys than is normally required in cases where the absolute immunity doctrine is applicable." Acosta Ltr., at 1.[4]

Permitting AUSAs to represent federal judges thus raises ethical concerns about which cases should be accepted and what, if anything, should be said to opposing counsel. These concerns are not matters of idle or academic speculation for the attorneys involved. At the Advisory Committee meeting, some of those present argued that a United States Attorney's office is analogous to a firm with one partner and a number of associates, and that the same considerations that bind the private bar also bind the government. *See Roberson* v. *United States,* 249 F.2d 737, 741 (5th Cir.), *cert. denied,* 356 U.S. 919 (1958) (United States Attorney is "of counsel" to all cases filed in his district). Others noted that as long as the judge was an AUSA's client, it was immaterial whether the suit was frivolous or easily defended, since the merit of a suit is not the usual test for whether an attorney-client relationship exists.[5]

Mr. Lorenz asked whether the judges should be forced to recuse themselves because the situation is one in which the judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). We do not believe that it is appropriate for this Office to issue an opinion instructing the judiciary on its ethical duties. The individual judge, the appeals court, and the Administrative Office of the United States Courts, which is charged with issuing opinions on the ethical standards of judges, are the ultimate authorities for deciding issues of disqualifaction under 28 U.S.C. § 455. Rather, the issue for this Department is how to resolve the ethical considerations for an AUSA, who, as the Attorney General's representative, appears before a federal judge whom he is or has represented.

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[4] We are unable to determine what percentage of requests for representation falls into each category, since not all decisions to represent judges are reported to the Civil Division or the Executive Office for United States Attorneys. Mr. Acosta reported four requests in the last three years.

[5] "[T]here invariably is at least an intangible interest on the part of any judge in having his actions vindicated." ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1331 (1975), at 1. Mr. Acosta expressed a concern that, in the real world, and especially in the administrative actions with which he was familiar, judges remembered the AUSAs who had not successfully defended their actions.

II. The Ethical Considerations

Attorneys employed by the Department are subject to the canons of professional ethics of the American Bar Association. 28 C.F.R. § 45.735-1(b). Canon 9 states: "A lawyer should avoid even the appearance of professional impropriety." To a layman, knowledge that the government's attorney has at some time also been the judge's attorney might well suggest that the AUSA will have an unfair advantage in practice before the judge. This was recognized in a recent ethics opinion in which a firm of private attorneys asked whether it could represent state judges "in actions brought against them under various federal statutes, including, presumably, [42 U.S.C. § 1983]." ABA Comm. on Ethics and Professional Responsibility (ABA Committee), Informal Op. 1331 (1975), at 1. The situation arose when the state's attorney general "declin[ed] to follow the practice of his predecessors" by providing the judges with state attorneys for their defense. *Id.*

The ABA Committee had some difficulty answering the question, noting that there was "no clearly controlling provision" in the Code of Professional Responsibility (CPR) and "no reference" in the Code of Judicial Conduct that was relevant. *Id.* at 2. "[I]n light of the sensitive problem in question," however, the ABA Committee turned to the ethical considerations of the CPR:

> For example, Canon 9 itself admonishes that "A lawyer should avoid even the appearance of professional impropriety." It is debatable whether serving in the capacity suggested is to be regarded as fulfilling the role of a part-time public officer. However, it is suggestive of the aspirational level of conduct suggested by the Code of Professional Responsibility that Ethical Consideration 8-8 suggests that "A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." Obviously, contrary policy arguments can be made that this practice ought not to be discouraged by imposition of undue burdens upon counsel willing to undertake a commendable and often arduous task.
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> Under the described circumstances, we conclude that the portions of the Code of Professional Responsibility relating to the avoidance of the appearance of impropriety suggest that in many instances it would be preferable for your firm not to appear before a judge who is then being

> represented by you in these circumstances. Of course, it would be advisable, if possible, to effect an advance agreement with the court administrator establishing a procedure to avoid any conflicting representation.

Id.

In view of the obvious disadvantage to the fashioning of a categorical rule, especially because the factual contexts in which the question may arise are so diverse, we hesitate, as did the drafters of Opinion No. 1331, to assert that one solution or another is best for all the varied cases that arise in the United States Attorneys' Offices around the country. There are at least three alternatives that could be adopted. First, the AUSA could disclose his prior or pending[6] representation to opposing counsel. Disclosure of the representation will sustain the public's confidence in the judicial system by: (1) eliminating the suspicion that something was hidden should the fact of representation come to light later on; and (2) demonstrating that the government is willing to disclose information which is arguably relevant, even though the disclosure might be of use to the other party. Disclosure will also sustain the faith of the private bar in the integrity of government attorneys.[7] These considerations are grounded in the proposition that the impartiality of the judiciary is at the heart of its ability to enforce its judgments. Government attorneys have a special responsibility, as representatives of the Executive Branch in particular and of the government in general, to ensure that that impartiality is maintained.[8]

Given the sweep of the absolute immunity defense available in most cases and the fact that a prolonged attorney-client relationship probably will not develop between the AUSA and the judge, the disclosure should generally establish the lack of a basis for suspecting prejudice or favoritism on the part of the judge. There may well be unusual cases, however, in which representation is extensive, *see Stump* v. *Sparkman,* 435 U.S. 349 (1978), and the attorney-client relationship has become fully developed. Once the fact of representation has been disclosed, it would be for opposing counsel to decide whether to file a motion alleging bias or prejudice, 28 U.S.C. § 144, or for a judge to determine whether to recuse himself. 28 U.S.C. § 455; ABA Code of Judicial Conduct, Canon 3.[9] Another alternative would be for the opposing

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[6] Whether an AUSA should ever appear before a judge whom he is then representing without disclosure to opposing counsel obviously raises a serious ethical question.

[7] It will also help to prevent those attacks on the judiciary which tend to threaten its dignity and integrity. ABA Code of Professional Responsibility, EC 8–6.

[8] "Reasons which call for a high standard of conduct on the part of all attorneys are increased in the case of counsel for the government." Fahy, *Special Ethical Problems of Counsel for the Government,* 33 Fed. B.J. 331, 332 (1974).

[9] It should not be too burdensome for an AUSA to keep track of which judges he has represented. The disclosure will not violate Canon 4's injunction to protect client confidences, since the fact of representation is presumably a matter of public record. Nevertheless, the Executive Office for United

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counsel to waive his right to seek disqualification of the judge. 28 U.S.C. § 455(e).[10]

Second, the judge could be represented by AUSAs from another United States Attorney's office. Since most cases involve motions to dismiss based on absolute immunity, which could be handled largely by mail, travel costs should be minimal. For those few cases involving more extended representation, we believe that the more extensive the attorney-client relationship, the more justified the cost would be to protect the AUSA and the judge from questions about their integrity.

Finally, the Department could insist that the Administrative Office of the United States Courts pay for outside counsel for the judges. *See* 53 Comp. Gen. 301 (1973).

We urge that this matter be resolved as promptly as possible in order to give the new United States Attorneys uniform guidance on an issue that will almost inevitably arise in their offices. Further, it would rescue judges from a dilemma in which acceptance of representation creates an ethical quandary both for them and for their attorneys.

Larry L. Simms
Deputy Assistant Attorney General
Office of Legal Counsel

States Attorneys may wish to issue a notice to all judges that this fact will be disclosed in all future cases in order to avoid any embarrassment to the judge.

We do not believe that representation of a judge by one AUSA requires any other AUSA in the district to inform opposing counsel of the representation. The Judicial Conference Advisory Committee on Judicial Activities does not consider the United States Attorney's Office a private law firm. As a result, a judge whose son is an AUSA need not recuse himself from cases in which the government appears, as would otherwise be mandated by 28 U.S.C. § 455(b)(5)(ii). Advisory Committee on Judicial Activities, Advisory Opinion No. 38 (1974). *See also United States* v. *Zagari*, 419 F. Supp. 494, 505–06 (N.D. Ca. 1976) (representation by AUSA of judge on motion to quash subpoena does not require recusal when either AUSA or any other member of the United States Attorney's office appears).

[10] "Any justice . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The Civil Division has expressed some concern that obtaining the waiver creates another set of problems: "It must be noted, however, that waivers will probably be closely scrutinized. A request by a judge for a waiver places counsel in the awkward position of acquiescing or openly doubting the court's impartiality . . . . Where a waiver is contemplated, then, the best procedure would be for the AUSA and his opponent to work it out among themselves at the AUSA's initiative and then present it to the judge."

Applicability of the California Penal Code to Investigations Conducted by the Federal Bureau of Investigation

A federal law enforcement officer who must violate state criminal law in the course of performing his official duty is immune from criminal prosecution and civil liability stemming from such a violation.

An informer may claim immunity from civil liability under state law by virtue of the Supremacy Clause, and it would be unwise to base an informer's defense on sovereign immunity, given the potential for government liability if the informer's actions were to be characterized as those of a government employee.

November 5, 1981

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

This responds briefly to your request for the views of this Office on your proposed response to the Federal Bureau of Investigation's (FBI's) request for the Department's views on the applicability of the California Penal Code to investigations conducted by the FBI involving electronic monitoring and recording of a confidential communication with the consent of one party to the conversation. FBI Legal Counsel has raised the question whether criminal or civil liability could be imposed on agents, informers, or cooperating third parties for invasion of privacy under §§ 630–637.2 of the California Penal Code. We concur in your conclusion that no federal officer, or cooperating party under his or her direction,[1] acting in compliance with applicable federal law on electronic monitoring and recording, could be held liable under state law.

California penal law prohibits wiretapping and prohibits electronic recording of conversations where it reasonably appears that any party intended the communication to be confined to the parties. *See* Cal. Penal Code §§ 631, 632 (West 1970 and Supp. 1981). The state courts have apparently uniformly construed the penal code to prohibit one party to a confidential communication from recording that conversation without the knowledge or consent of the other party. *See, e.g., Forest E. Olson, Inc.* v. *Superior Court,* 63 Cal. App. 3d 188, 133 Cal. Rptr. 573

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[1] We include both informers and third parties cooperating for the purpose of the monitoring or recording.

(1976). A civil remedy and minimum damages award of $3,000 are also provided for violations of these prohibitions, *see* Cal. Penal Code § 637.2 (West 1970).

Section 633 provides an exemption for certain state law enforcement officers and persons acting pursuant to their direction. In an opinion of the California Attorney General, in the context of other state law enforcement officers, this exemption was construed to be limited to the officers specifically identified. 55 Op. Cal. Att'y Gen. 151 (1972). The FBI questioned, therefore, whether the exemption, which does not expressly include federal officers, would be unavailable to federal officers or cooperating parties, who might then be held criminally or civilly liable.

You have responded that, in addition to the legislative history of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2518, the case law indicates that a federal investigator would be immune from state criminal prosecution in consensual monitoring situations notwithstanding the more restrictive requirements of California law. We agree. This Office has repeatedly maintained that federal law enforcement officers who must violate state criminal law in the course of performance of their official duties could maintain a defense based upon the supremacy of a proper federal law enforcement function. *In re Neagle,* 135 U.S. 1, 75 (1890); *Clifton* v. *Cox,* 549 F.2d 722 (9th Cir. 1977). When the federal law enforcement operation requires the use of an informer or other cooperating party, our opinions have treated this party as sharing in the officer's immunity.

With regard to civil liability imposed under California law for violation of the penal code, you have also concluded that the federal officer or a person acting under his or her direction would not be personally liable. Again, we agree that the officer would be immune. In addition to the same defense based on the Supremacy Clause,[2] a federal official is shielded by sovereign immunity when sued for civil damages for actions committed "within the outer perimeter of [the official's] line of duty." *Barr* v. *Matteo,* 360 U.S. 564, 575 (1959); *cf. Clifton* v. *Cox,* 549 F.2d at 726–28. The officer's compliance with federal wiretapping law would meet this standard.

The immunity of the cooperating party in a civil action presents an additional consideration. Your memorandum concludes that the cooperating party would in all likelihood be found to be a "government agent" immune from criminal prosecution and that similar reasoning would seem to exempt him or her from civil liabililty under the *Barr-Clifton* line of cases. It is true, as your memorandum points out, that informers have been treated as government agents for purposes of certain constitutional principles limiting government action, *see, e.g.,*

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[2] The Supremacy Clause defense is not limited to the criminal context. Our prior opinions have recognized that the defense would be available, for example, in a state bar disciplinary proceeding.

Hoffa v. *United States,* 385 U.S. 293, 307 (1966); *United States* v. *Cella,* 568 F.2d 1266, 1282 (9th Cir. 1977), *United States* v. *Upton,* 502 F. Supp. 1193, 1196 n.l (D.N.H. 1980). But to assert that, in addition the immunity from liability under state civil law granted by virtue of the Supremacy Clause, the informer is clothed with the government's own immunity from civil damages, might raise the question whether the government itself would be liable for the actions of informers in circumstances where the government has waived its sovereign immunity to suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671–2680, for the actions of its officers and employees.

This Office has thus far resisted the conclusion that informers are government employees within the meaning of the FTCA. The Ninth Circuit, at least, has recently agreed. *Slagle* v. *United States,* 612 F.2d 1157, 1159–61 (9th Cir. 1980). At least where the same assurance of immunity can be provided to the cooperating party on Supremacy Clause grounds, we see no reason to raise the defense of sovereign immunity, given the potential for government liability for the informer's actions, if not on these facts, then on others, if the informer were to be characterized as an employee.

The FBI has also requested advice on the procedure that the Department would follow if an agent or cooperating party were named as a defendant in a state criminal prosecution or civil action. As your memorandum notes, the defense to a criminal prosecution could be asserted upon removal of the prosecution to federal court, *see* 28 U.S.C. § 1442(a)(1), or by application to a federal court for pretrial habeas corpus relief, *see* 28 U.S.C. § 2241(c)(2). The civil action could also be removed to federal court. 28 U.S.C. § 1442(a)(1). We note additionally that neither removal nor habeas corpus relief in cases involving cooperating parties would be dependent on the party's status as an employee. Removal, for example, is available to persons "acting under" an officer of the United States; habeas corpus relief may be granted to persons "in custody for an act done or omitted in pursuance of an Act of Congress." Thus procedurally as well as substantively the defense of sovereign immunity adds nothing to the full protection afforded to cooperating parties by the Supremacy Clause. With this slight reservation with respect to the reasoning of your memorandum, we concur.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Steel Industry Compliance Extension Act of 1981

The Steel Industry Compliance Extension Act of 1981 (Act) permits the Administrator of the Environmental Protection Agency to accede to a steel company's request for an extension of otherwise applicable deadlines for compliance with the Clean Air Act only if the Administrator finds that the company has met its ongoing obligations under its existing consent decrees, or that any violations are de minimis in nature.

While the term "de minimis" is not defined in the Act, the legislative history confirms that it was meant to have its ordinary meaning—that is, "negligible" or "insubstantial or inconsequential."

November 9, 1981

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

This responds to your request for our views concerning the proper construction of the term "de minimis" as used in the Steel Industry Compliance Extension Act of 1981, Pub. L. No. 97-23, 95 Stat. 139 (to be codified at 42 U.S.C. § 7413(e)) (Act), familiarly known as the Steel Tripartite Amendment, Tripartite, and Steel Stretch-out. We have found nothing in the statute or its legislative history to suggest that de minimis was meant to have anything other than its usual meaning—that is, negligible, insubstantial, or inconsequential. *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 692, 693 (1946). We therefore conclude that the Act does not permit the Administrator of the Environmental Protection Agency (EPA) to enter into or modify a consent decree for the purpose of extending compliance deadlines under the Clean Air Act, 42 U.S.C. § 7401 *et seq.* (Supp. IV 1980), unless the Administrator finds that a company is in compliance with its existing consent decrees, or any violations are of a de minimis nature, as defined, at the time the company applies for an extension.

In reaching this conclusion, we have carefully reviewed the legislative history of the Act, including the House and Senate reports,[1] the hearings,[2] and the floor debates.[3] This material makes it clear that both Congress and the members of the Steel Tripartite Committee (Committee) who drafted the Act intended that the EPA Administrator have discretion to grant extensions only to those companies who had met their ongoing obligations under a consent decree.

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[1] H.R. Rep. No. 161, 97th Cong., 1st Sess. (1981); H.R. Rep. No. 121, 97th Cong., 1st Sess. (1981); S. Rep. No. 133, 97th Cong., 1st Sess. (1981).

I. Background

The Clean Air Act Amendments of 1970, 42 U.S.C. § 1857 *et seq.* (1976) (amending the Air Quality Act of 1967, Pub. L. No. 90–148, 81 Stat. 485 (codified at 42 U.S.C. § 1857–1871*l*) (1970)) (amended 1977), developed lists of air pollutants, promulgated national ambient air quality standards, 42 U.S.C. § 1857c–4 (1970 ed.), and required each state to develop a plan to implement the air quality standards. *Id.* at § 1857c–5. The state, or, if it failed to act, the EPA, was authorized to prevent the construction or modification of any new sources of pollution—such as factories—from being built if the construction would prevent attainment or maintenance of the national air quality standards. *Id.* at § 1875c–5(a) (2)(D), (4). The Clean Air Act Amendments of 1977, 42 U.S.C. § 7401 (Supp. IV 1980), extended the deadlines for meeting most of the standards for pollutants to December 31, 1982. The EPA Administrator was charged with seeking injunctions and recovering civil penalties against those who violate the Clean Air Act's provisions. 42 U.S.C. §§ 7413, 7420 (Supp. IV 1980). Through this enforcement mechanism, the Administrator has brought actions and, in most instances, obtained consent decrees. Mandatory investment schedules contained in those decrees insure, through the mechanism of the threat of stipulated damages, that the companies meet the 1982 final compliance deadline.[4]

By 1979, when the EPA had reached consent decrees with most of the major steel companies, H.R. Rep. No. 121, *supra,* at 4–8 (Table 1), expenditures for pollution control had become a major drain on the resources available to the steel industry for capital investment. In 1980, for example, 19% of the steel industry's annual capital expenditure was for pollution control. This was far greater than that spent by comparable heavy industries such as the electric utilities (9.2%) or the automotive industry (5.4%). *Id.* at 9 (Table 2). Not only was the percentage of capital invested higher, it was also more difficult for the steel industry to raise. *Id.* (Table 3). This, the steel companies argued, was due to pressure on the industry by the federal government not to raise prices, making it increasingly difficult to recapture costs, and because of the willingness of the federal government to sacrifice the domestic steel industry to foreign policy considerations by allowing "dumping" of foreign steel. *Hearings on H.R. 1817, supra,* at 48–9; *Tripartite Hearings, supra,* at 101–02 (report prepared by the Congressional Research Service).

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[2] *Steel Tripartite Committee Proposal: Hearings on H.R. 1817, H.R. 2024, H.R. 2219, et al. Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce,* 97th Cong., 1st Sess. (1981) [hereafter cited as *Hearings on H.R. 1817*]; *Steel Industry Compliance Extension Act of 1981: Hearing on S. 63 Before the Senate Comm. on Environment and Public Works,* 97th Cong., 1st Sess. (1981) [hereafter cited as *Hearing on S. 63*]; *Report of the Steel Tripartite Comm. Hearings Before the Senate Comm. on Environment and Public Works,* 96th Cong., 2d Sess. (1980) [hereafter cited as *Tripartite Hearings*].

[3] 127 Cong. Rec. H3747–52 (daily ed. June 26, 1981); *id.* at S6985–87 (daily ed. June 25, 1981); *id.* at S6605 (daily ed. June 19, 1981); *id.* at S6090–93 (daily ed. June 11, 1981); *id.* at H2463–64 (daily ed. May 28, 1981); *id.* at H2444–56 (daily ed. May 28, 1981).

[4] *See* C. Stewart, Air Pollution, Human Health and Public Policy 35–48 (1979). *See generally,* Environmental Law Institute, Air and Water Pollution Control Law: 1980 (G. Wetstone, ed. 1980); *Hearing on S. 63, supra,* at 62 (Report of the Steel Tripartite Advisory Committee Working Group on Environmental Protection).

The Steel Tripartite Committee was formed to advise the President on the steel industry's problems and to suggest ways to revitalize the industry. It was made up of representatives of the senior management of the steel companies, the United Steelworkers of America Union, and the federal government. The Committee's working group on environmental issues later added a fourth member, the Natural Resources Defense Council (NRDC).[5] These disparate groups brought to the negotiating table concerns about the flagging health of the steel industry, the protection of local economies threatened by plant closings, the promotion of worker health and safety, and the public's interest in continued progress toward the goals of the Clean Air Act. Out of their dynamic balancing of interests and resultant compromises came the 1981 amendments embodied in the Act. In order "to provide the steel industry with vitally needed capital for modernization, while maintaining public health and environmental protection," the Committee proposed that steel companies be given 3 more years in which to meet the requirements of the Clean Air Act. H.R. Rep. No. 121, *supra,* at 8–9. The "trade-off" for the extension of the deadline for compliance with the Clean Air Act was that the companies obtaining the benefit of the extension would invest in modernization efforts the capital resources which would otherwise have gone into more immediate compliance efforts.[6] The compromise reflected by the Act was, therefore, to improve the efficiency and productivity of the American steel industry at the cost of some temporary setbacks in the achievement of the goals for cleaner air contained in the Clean Air Act. However, to ensure that the companies would not abandon progress toward pollution control, each company applying for an extension would have to meet six carefully crafted conditions. In order to consent to an extension of the schedule for compliance, the EPA Administrator would have to find:

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[5] The NRDC is a national environmental group which frequently plays an active role in the legislative process. It was invited to join the working group by the Executive Office of the President and the United Steelworkers of America Union.

[6] Since the newer equipment would contain the most modern technology, it was argued that it would usually be cleaner than what it was replacing.

> (A) That the extension is necessary to allow the company to make capital investments designed to improve efficiency and productivity;
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> (B) That funds equal to what would otherwise have been spent by December, 1982 on pollution control will be spent within two years on capital investments;
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> (C) That the company will enter into a consent decree establishing a schedule for bringing all its stationary sources of pollution into compliance;
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> (D) That the company will have enough money to comply with its consent decrees;
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> (E) That the company is in compliance with existing federal consent decrees or that any violations are de minimis in nature; and
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> (F) That any extensioin will not result in degradation of air quality during the extension.

See Act, § 113(e)(1) (A)–(F). Each of these requirements was included in response to objections that the Act was special-interest legislation. On each of the six, the company "bears the burden of proof." H.R. Rep. No. 121, *supra,* at 10.

Section 113(e)(1)(E) is Congress' response to critics who claimed the Act would "give relief to those companies which have been avoiding the law and penaliz[e] those who have complied." *Tripartite Hearings, supra,* at 27 (Follow-up Questions for EPA). As finally enacted, § 113(e)(1)(E) requires that

> the Administrator find[ ], on the basis of information submitted by the applicant and other information available to [the Administrator] that the applicant is in compliance with existing Federal judicial decrees (if any) entered under section [113] of this Act applicable to its iron- and steel-producing operations or that any violations of such decrees are de minimus [sic] in nature.

Act, § 113(e)(1)(E). You have asked us to consider what kind of violations can be considered de minimis.

II. The Meaning of De Minimis Under the Act

De minimis is not defined in the Act. It was suggested as the standard by Ms. Frances Dubrowski, NRDC representative, during the late stages of the Committee's drafting of the Act.[7] The suggestion was made in response to the steel industry's suggestion that the test be "substantial compliance" with one's consent decree.[8] That the parties intended a narrow definition is supported by the Senate report which states:

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[7] Telephone conversation with Mr. Stephen D. Ramsey, Chief, Environmental Enforcement Section, Land and Natural Resources Division, United States Department of Justice, October 16, 1981.

[8] *Id.*

> A de minimis violation of an emission limitation is a violation resulting from circumstances beyond the control of the source owner or employee which causes no measurable increase in emissions from a source.

S. Rep. No. 133, *supra*, at 4. "The intent of this provision is twofold: to ensure that pollution control expenditures required to be made before the grant of an extension under this act are not deferred and to ensure that only those companies making a good faith effort to comply with existing environmental obligations obtain the benefit of further deadline extensions." H.R. Rep. No. 121, *supra*, at 10.

De minimis matters have traditionally been defined as "negligible," "trifles," "insubstantial and insignificant." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692, 693 (1946).[9] The legislative history is scanty on the issue, but what there is reflects this understanding. The Senate report, for instance, defines de minimis violations of a consent decree as those resulting in "no measurable increase in emissions from a source." S. Rep. No. 133, *supra*, at 4. A violation that "result[s] from circumstances beyond the control of the source owner" would bar even a minor violation, if caused by the owner's fault or neglect. *Id.* And a violation that really causes "no measurable increase in emissions" must be one so minor as to be truly insignificant. *Id.*

Whether a particular violation is de minimis is a decision that must initially be made by EPA, since the discretion belongs to the Administrator and it is his expertise which will inform your review and will guide your judgment as to whether you (on behalf of the Attorney General) will approve the modification of the decree. The EPA Implementation Manual describes the test to be used.

> In determining what are insignificant deviations, the agency should consider the extent of the delay, the nature of the violation, the good faith of the company, and the extent to which the delay impacts other provisions of the decree.

Manual, Ex. G., at 2. We assume this involves determinations of issues such as whether a violation is temporary or, if easily curable, likely to be cured because of the company's good faith willingness or effort to cure. However, "[w]here emissions limits are in issue, these cannot be viewed as 'de minimis' unless they cause no significant increase in emissions from a source." *Id.* at 1.

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[9] *See also Industrial Union Dept.* v. *American Petroleum Institute*, 448 U.S. 607, 664 (1980) (Burger, J., concurring) ("insignificant," "scant or minimal risks"); *Hunter* v. *Madison Ave. Corp.*, 174 F.2d 164, 167 (6th Cir. 1949) ("inconsequential").

III. The Role of § 113(e)(1)(E) and De Minimis Under the Act

The Administrator should make every effort to give effect to Congress' desire to afford economic relief to the steel industry so that it can devote capital resources to modernization. The Act, however, expressly and unequivocally conditions the companies' eligibility for an extension of the time deadlines under the Clean Air Act on the Administrator's making of two crucial findings: no "degradation of air quality," (§ 113(e)(1)(F)), and no extensions unless a company is "in compliance with existing Federal judicial decrees (if any) . . . [or] any violations of such decrees are de minim[i]s in nature." (§ 113(e)(1)(E)). If the Administrator cannot reasonably make such findings, the Act simply does not allow an exercise of discretion that ignores the Act's language in an attempt to maximize the number of steel companies eligible for relief. Compliance with the pollution control schedules contained in the consent decrees is just as integral a part of the Act as the desire to allow diversion of capital from air pollution equipment to improvements in plant efficiency.

Congress clearly contemplated, based in substantial part on the testimony of representatives of the steel industry, that compliance with existing decrees was a condition which was acceptable to the industry and attainable by it. While the provision was being fully debated by the committee that drafted the statute and the Congress that passed it, there was no indication that the steel companies could not or would not comply. In fact, on March 3, 1981, the EPA testified that most of the steel companies would be in compliance with their respective consent decrees by the end of the year.

> The steel industry used to have a fairly well-deserved reputation as a major polluter of air and water. However, that situation has now changed very much for the better. Where in July 1978 only 32 percent of air pollution sources in the steel industry were in compliance or on court-ordered compliance schedules, by the end of this year that number will be up to approximately 90 percent.

Hearings on S. 63, supra, at 6 (statement of Walter C. Barber, Jr., Acting Administrator, EPA); *Hearings on H.R. 1817, supra,* at 88 (85%) (statement of Walter C. Barber, Jr.); *Tripartite Hearings, supra,* at 13 (84%) (statement of Michele B. Corash, General Counsel, EPA). Since the steel companies' representatives were present and made no objection to these figures,[10] Congress must have assumed that this condition could be met by most steel companies.

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[10] The steel companies complained that because they *were* complying with their respective consent decrees, they would have no money left for modernization under the Act. *See* n.13 *infra.*

The necessity of complying with outstanding consent decrees was discussed during the floor debates[11] and the hearings.[12] The steel companies themselves expressly recognized that the failure to be in compliance with their respective consent decrees would bar them from relief under the Act and, therefore, that each day's delay in enacting the law reduced the value of the Act to them.

> If I might depart from the Chairman's questions briefly, the point we most want to make here today is that this issue requires *immediate* legislative action. Those companies who have existing consent decrees with the EPA are on a schedule of compliance which requires weekly and sometimes daily commitment of funds to meet the December 31, 1982 deadline. Failure to meet these increments of progress places us in technical violation of the consent agreements. *S. 63 states that an extension applicant must be in compliance with existing consent agreements.* [Emphasis added.] If we are to have any funds to defer for modernization, we must have this amendment now.

Hearings on S. 63, supra, at 47 (statement of George A. Stinson, Chairman of National Steel Corp.) (March 3, 1981). A few weeks later, the same speaker made the point again.

> The terms of the agreement, coupled with long leadtimes for construction, require us to commit the funds early in the agreement if we are to meet the 1982 completion dates. Some funds for engineering, for site clearance, and the like have already been expended, and within a very few weeks we will have to make major capital commitments which in many cases will be impossible to defer further.
>
> These commitments are spelled out in the judicial decree with specific dates for action, and failure to meet those dates puts us in technical violation of the agreement. *Any violation of the agreement would in turn make us ineligible under the provisions of H.R. 1817 if it becomes law.*
>
> For these reasons, we and others need this amendment very soon if it is to have any benefit toward a rapid modernization of the industry. Passage of the amendment later this year under the reauthorization of the Clean Air Act would be of very little, if any, benefit to the industry.

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[11] 127 Cong. Rec. H3750 (daily ed. June 26, 1981); *id.* at H2447 (daily ed. May 28, 1981).

[12] *Tripartite Hearings, supra,* at 18 (EPA), 27 (EPA); *Hearings on S. 63, supra,* at 91 (NRDC); *Hearings on H.R. 1817, supra,* at 132 (statement by Pres. Carter submitted by the White House for the record).

Hearings on H.R. 1817, supra, at 65 (emphasis added) (March 25, 1981).[13] David M. Roderick, Chairman of the United States Steel Corp., made the same point at the same hearings.

> The existence or prospects of the consent decrees, as I mentioned earlier, is what creates the urgent need for this legislation. . . . Our willingness to enter into these agreements has created binding obligations to make capital commitments that I mentioned earlier. In order to comply with our consent decrees and make the milestone schedules which they contain, we must commit millions of dollars virtually every month. Once these funds are committed, they are no longer available to be considered for stretchout, and we lose the opportunities to use these funds in the interim for modernization.

Id. at 70.

The Administrator's flexibility in interpreting the Act is limited by the fact that any modification to any consent decree issued pursuant to the terms of the Act must be approved by the judge in whose court the prior consent decree was approved. Act, § 113(e)(7)(B)(ii). Information (unless confidential) used to make the decision and the decision itself will be matters of public record. *Id.* § 113(e) (3), (7). The right of private parties or states to intervene under § 304 of the Clean Air Act, 42 U.S.C. § 7604 (Supp. IV 1980) for violation of emission standards remains available, § 113(e)(8); H.R. Rep. No. 121, *supra,* at 13, and would no doubt be exercised if such litigants felt that there had been an abuse of discretion by the Administrator in consenting to an extension where the de minimis finding was not defensible. *United States* v. *Republic Steel Corp.,* 15 Env't Rep. (BNA) 1463 (N.D. I11. 1980); Fed. R. Civ. P. 24. Evaluation of whether a violation is de minimis, therefore, is not a matter analogous to the exercise of prosecutorial discretion—it is an administrative decision that will be reviewed by the courts and critiqued by highly interested advocates. Unless supported by a cogent rationale, a finding that a violation is de minimis is likely to be rejected.

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[13] The steel companies were obliged to meet schedules in their consent decrees premised on a complete cleanup by December 1982. The race to get the Act passed before all the money was committed to compliance as mandated by consent decrees is illustrated in the following exchange between Rep. Waxman and Mr. Stinson, Chairman of National Steel Corp., and Mr. Roderick, Chairman of United States Steel Corp.

> *Mr. Waxman.* Mr. Roderick and Mr. Stinson, when is the latest possible date for passage of this legislation to be valuable to the industry?
>
> *Mr. Stinson.* Well, every additional day, Mr. Chairman, poses a problem for us. It is quite difficult for me to say whether it is March 31 or April 30, but I could definitely say to you that if it were delayed into the late summer, it would be of virtually no benefit to us.
>
> *Mr. Roderick.* . . . [E]ach month of delay would mean basically about $15 million to $20 million that otherwise would be available for modernization would have to go to environmental commitments, and if by July we didn't have even the EPA approval by that time, we would pretty well have run the gamut, we would have pretty well have had to commit on almost all the facilities in order to make the 1982 deadline. So I would say legislatively, Mr. Chairman, we would hope that it would be possible to have this legislation sometime no later than the end of April, allowing us time to make our presentations to the EPA and satisfy their requirements so that we would not have to commit, let's say, after July.

Hearings on H.R. 1817, supra, at 90. The Act did not become law until July 17, 1981.

IV. Arguments in Favor of a Broader Meaning of De Minimis

We have evaluated several potential arguments that might be advanced to support a broader meaning of de minimis, but they appear to be unsupported by the traditional meaning of the term or the Act's legislative history.

A. We have considered whether de minimis might be measured against a particular company's entire pollution control program or its compliance rate with all of its consent decrees, rather than measured against its operations at a particular plant. We do not believe that it may. The Act was an attempt to balance the steel industry's need for extensions so that it could devote capital resources to modernization against the continuing interest of the public in cleaner air. Exceptions under the Act were to be carefully scrutinized to ensure that all the conditions were met. "The bill does not authorize the granting of extensions on a blanket basis. Each request for an extension with respect to a specific emission control requirement and facility is to be considered individually." S. Rep. No. 133, *supra,* at 1. The emphasis appears to have been placed quite intentionally on individual stationary sources. In fact, rather than a violation at one plant being viewed as de minimis because of compliance at 99% of the company's other plants, the drafters apparently contemplated that a violation at one plant would preclude the granting of an exception even for the 99% of that company's plants that are in compliance.

> The owner of a *source* which is in violation of an emission limitation after a compliance deadline in an existing decree is not eligible for a compliance extension beyond 1982 for *any source* which would otherwise be eligible until *the* violating *source* is brought into compliance with the applicable emission limitation.

Id. at 4 (emphasis added).[14] We therefore do not believe that determination of whether a violation is de minimis should be made in the context of a company's entire compliance program.

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[14] This understanding is reflected in a recent letter from the United States Steel Corp. to the EPA. "[T]he Act appears to contemplate that the Administrator may make a finding related to only one of the applicant's sources which leads to a decision that the applicant is ineligible under the Act, and that the ineligibility then applies to all of applicant's sources." Letter from Ms. Dorothy H. Servis, Senior General Attorney, Environmental and Real Estate, United States Steel Corp., to Mr. Michael Alushin, Director, Steel Tripartite Task Force, EPA at 2 (Oct. 23, 1981).

Moreover, this interpretation of de minimis would lead to an inconsistent and unequal application of the de minimis standard. The same violation would be a de minimis violation for a large company with many plants but a substantial violation for a small company with only a few plants. The larger the company, the more violations it could absorb and still obtain an exception. This construction would be particularly anomalous since the larger companies are also presumably generally better able to generate the capital necessary to eliminate violations. We therefore do not find support for the argument that whether a violation is de minimis should be measured against the total company compliance with the Clean Air Act or all of a particular company's outstanding decrees.[15]

B. We have also considered whether the Administrator could avoid the issue of whether or not a violation is de minimis by agreeing to modifications of the existing consent decrees to remove the requirements that give rise to the violations. We believe that the Act does not authorize such a procedure. Not only would this create a major loophole that would permit the Administrator effectively to eliminate § 113(e)(1)(E) from the Act, but it would also contradict the Act's language and the repeated statements by all parties assuring Congress that the steel companies knew they had to be in compliance and would be in compliance with their consent decrees. Most importantly, it would contradict the clearly expressed desire of Congress that only companies that had made the effort and expended the funds necessary to comply with their outstanding consent decrees were entitled to this exception. "[E]xisting decrees may not be amended so as to make companies eligible for extensions under this proposal." H.R. Rep. No. 121, *supra,* at 10. Congress foresaw and precluded this argument.

C. The same response must be made to the suggestion that the Administrator commence contempt actions against the violators and then settle the actions, collect outstanding stipulated penalties, and substitute new compliance schedules. Substitution of new compliance schedules would effectively amend existing consent decrees, contrary to the letter and spirit of the House report. It would permit companies that had failed to abide by their consent decrees access to the benefits of the Act. Since we believe that Congress clearly intended that such companies be barred from an extension under the Act, we do not believe the Administrator may interpret the Act to permit such substitution of new compliance schedules.

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[15] A similar argument was rejected in an early case discussing de minimis, *NLRB* v. *Cowell Portland Cement Co.*, 108 F.2d 198 (9th Cir. 1939), in which the issue was whether a company was doing enough interstate business to fall within the NLRB's jurisdiction.

> The quantity of cement shipped out of state is not de minimis merely because it is but a small percentage of respondent's total sales. Otherwise, we would have the anomaly of one plant under federal regulation because exporting its entire product of 14,000 barrels while alongside it another competing plant was under state regulation because, though shipping the same amount of 14,000 barrels, they constituted, say, but 4 percent of its product. Congress could not have intended that it would subject laboring men or employers to such a confusing and, in business competition, such a destructive anomaly.

Id. at 201.

We believe that de minimis means what it has traditionally meant—an insignificant or insubstantial matter. Where the violation of a consent decree cannot reasonably be described as insignificant, we do not believe that the Administrator can properly authorize an extension under the Act.

V. Conclusion

We have not attempted to determine whether any particular company is or is not in violation of its consent decrees or, if the facts support a finding that there is a violation, whether that violation is de minimis. That would require a factual determination which we are not qualified to make and must be made, subject to your approval, by the Administrator. Each applicant, as noted earlier, has the burden of establishing that it is in compliance with the consent decrees or that its violations are de minimis.

The normal meaning of the term de minimis is entirely consistent with the Act's legislative history. Indeed, all of the legislative history on the subject supports that conclusion and none of it supports a more expansive definition. Since the EPA and the steel industry and Congress all seemed to believe that nearly all of the steel companies would be in compliance with their consent decrees, the Act did not contemplate any substantial deviations from the consent decrees. We have no way of determining whether Congress would have voted for the Act at all if the information had established that the companies were not then substantially in compliance or capable of placing themselves into such a status. We certainly cannot attribute to Congress an intent to allow the EPA Administrator to ignore or deviate in any material way from one of the integral components of the Act.

THEODORE B. OLSON
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Office of Legal Counsel

The President's Power to Remove Members of the Federal Council on the Aging

The text and legislative history of the statute creating the Federal Council on the Aging indicate that Congress did not intend to restrict the President's power to remove his appointees to the Council. Neither the Council's "independence" in terms of its membership and staff, nor its function of providing advice to Congress necessarily suggest that Congress intended to restrict the President's power of free removal which is ordinarily incident to his power of appointment.

Because the structure and functions of the Federal Council on the Aging establish that it is a purely executive body, Congress could not constitutionally limit the President's power to remove its members.

November 13, 1981

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for our opinion whether the President has the power to remove the members of the Federal Council on the Aging (the Council). In the absence of any evident congressional intent to limit the President's power of removal, and on the basis of well-settled principles of constitutional law, we conclude, for reasons set forth below, that the President does have the power to remove Council members.

I. The Council

The Council is established pursuant to 42 U.S.C. § 3015 (1976 & Supp. III 1979). Its fifteen members are appointed by the President with the advice and consent of the Senate to serve three-year terms. *Id.* § 3015(a). According to the statute, members "shall be appointed so as to be representative of rural and urban older Americans, national organizations with an interest in aging, business, labor, and the general public. At least five of the members shall themselves be older individuals." *Id.* § 3015(a). Since 1978 amendments, no full-time officer or employee of the federal government may be appointed as a member of the Council, *id.* 42 U.S.C. § 3015(a) (Supp. III 1979); and the Secretary of Health and Human Services and the Commissioner on Aging are no longer *ex officio* members of the Council. The statute does not expressly provide for removal of Council members, nor does it expressly insulate them from removal at the pleasure of the President.

Because the nature of the functions performed has come to be the focus of the removal power as a matter of determining both congressional intent and the limits of congressional power to restrict the President's power to remove his appointees, we set out the Council's duties in full. As prescribed by statute, the Council shall:

> (1) advise and assist the President on matters relating to the special needs of older Americans;
>
> (2) assist the Commissioner [on Aging] in making the appraisal of [personnel] needs [in the field of aging] required by section 3032 . . .;
>
> (3) review and evaluate, on a continuing basis, Federal policies regarding the aging and programs and other activities affecting the aging conducted or assisted by all Federal departments and agencies for the purpose of appraising their value and their impact on the lives of older Americans;
>
> (4) serve as a spokesman on behalf of older Americans by making recommendations to the President, to the Secretary [of Health and Human Services], the Commissioner, and to the Congress with respect to Federal policies regarding the aging and federally conducted or assisted programs and other activities relating to or affecting them;
>
> (5) inform the public about the problems and needs of the aging, in consultation with the National Information and Resource Clearing House for the Aging, by collecting and disseminating information, conducting or commissioning studies and publishing the results thereof, and by issuing publications and reports; and
>
> (6) provide public forums for discussing and publicizing the problems and needs of the aging and obtaining information relating thereto by conducting public hearings, and by conducting or sponsoring conferences, workshops, and other such meetings.

42 U.S.C. § 3015(d) (1976 & Supp. III 1979).

The Council is further directed to undertake a thorough study and evaluation of federal and federally assisted programs for older Americans, including

> (A) an examination of the fundamental purposes of such programs, and the effectiveness of such programs in attaining such purposes;
>
> (B) an analysis of the means to identify accurately the elderly population in greatest need of such programs; and

(C) an analysis of numbers and incidence of low-income and minority participants in such programs.

42 U.S.C. § 3015(g)(2) (Supp. III 1979). The study may also include

(A) an exploration of alternative methods for allocating funds under such programs to States, State agencies on aging, and area agencies on aging in an equitable and efficient manner, which will accurately reflect current conditions and insure that such funds reach the areas of greatest current need and are effectively used for such areas;

(B) an analysis of the need for area agencies on aging to provide direct services within the planning and service area; and

(C) an analysis of the number of nonelderly handicapped in need of home delivered meal services.

42 U.S.C. § 3015(g)(3) (Supp. III 1979).

The statute also authorizes staff personnel for the Council and requires the head of each federal department and agency to provide the Council with information and other assistance. 42 U.S.C. § 3015(e) (Supp. III 1979). At least annually, and more often as the Council deems advisable, the Council is required to report its findings and recommendations to the President, who then transmits the report to Congress, with his comments and recommendations. *Id.* § 3015(f).

II. Statutory Interpretation

In the context of a statute that is silent on the issue of the President's removal power, it is sometimes difficult to separate the statutory analysis from the constitutional analysis. Nevertheless, we focus initially on the statutory scheme and the legislative history because of the familiar injunction that decision on constitutional grounds should be avoided if a statutory ground is sufficient. *See Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). The statute itself, as we have noted, is silent on the question of removal. Nevertheless, the history of the Council indicates that Congress could not have intended that its members would not be freely removable by the President.

The Council is the most recent successor to various presidential advisory commissions on the aging. National conferences on aging were held in 1950 and 1952. On March 21, 1956, President Eisenhower summarized recent and proposed actions of the federal government affecting older citizens and announced his intention to create a federal council on aging. Established in April 1956, this first council was composed of representatives of various government agencies. The council called for another conference on aging, which was held in June

1956. Following two congressionally authorized studies of problems related to the aging, the White House Conference on Aging Act of 1958 (Pub. L. No. 85-908, 72 Stat. 1746) was passed to provide for a White House Conference on Aging, to be called by the President in 1961. The Conference made recommendations for continuing and expanding federal and state programs for the elderly, including establishment of a federal coordinating agency. *See generally* S. Rep. No. 247, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 1884.

As a follow-up to the Conference, President Kennedy established the President's Council on Aging in May 1962. Exec. Order No. 11,022, 3 C.F.R. 602 (1959-1963 Comp.). This Council was also composed of Cabinet officers and other federal officials and was directed to study the problems of the aging and make recommendations to the President for policies and programs.

The first statutory authority for an advisory council on aging was provided by the Older Americans Act of 1965, 42 U.S.C. § 3001 *et seq.* (1976 & Supp. III 1979) which established an Advisory Committee on Older Americans comprised of the Commissioner on Aging and fifteen members appointed by the Secretary of Health, Education, and Welfare (HEW). The Committee was to advise the Secretary on matters bearing on his responsibilities under the Act and related activities of the Department of HEW. Members were selected with experience in the field of interest in the particular problems of aging. *See generally,* H.R. Rep. No. 1203, 92d Cong., 2d Sess. 8 (1972); H.R. Rep. No. 1150, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3388, 3392. In 1967, the Secretary was authorized to provide staff for the Advisory Committee.

By 1972, Congress noted that the problems, issues, and recommendations of the White House Conference on Aging went far beyond the activities of the Department of HEW. The House Committee on Education and Labor accordingly recommended the establishment of a presidential advisory committee. The bill, H.R. 15657, 92d Cong., 2d Sess. (1972), would have replaced the Advisory Committee with a national advisory council to "advise and assist the President on matters relating to the special needs of older Americans." The Senate version of the bill would have established the Older Americans Advocacy Commission, "charged with the duty of advocating the interests of older Americans throughout the whole range of federal activities." *See* H.R. Rep. No. 43, 93d Cong., 1st Sess. 10, *reprinted in* 1973 U.S. Code Cong. & Ad. News 1327, 1336. The Commission would also have been empowered to evaluate existing programs to inform the public about the needs and concerns of the aging and the relevant federal activities. *Id.*

The bill as it emerged from the conference committee was the origin of the present Federal Council on the Aging. The committee adopted that name and consolidated the functions as provided in the House and Senate bills. The bill was later vetoed by the President, but it provided the basis for the 1973 amendments to the Older Americans Act of 1965, which did establish the Council. The House committee in 1973 repeated the conference statement that " '[i]t is the intention of the conferees that this body function as more than a passive advisory body, and that it work to actively promote the interests of older Americans throughout the whole range of federal policies and programs affecting them.' " 1973 U.S. Code Cong. & Ad. News, *supra,* at 1336. The Council was further charged with undertaking three studies of benefit programs, taxes, and transportation needs.

The Older Americans Act was amended again in 1978. The House report explained that "[a]s a spokesman and advocate on behalf of the elderly, the committee believes that the Council should have a greater degree of independence." 1978 U.S. Code Cong. & Ad. News, *supra,* at 3398. The changes that were made "to strengthen the independence of the Council," *ibid.,* were precluding full-time employees of the federal government from membership on the Council and specifically authorizing staff for the Council. The first change was intended "to eliminate the potential for conflicts of interest" and thereby improve the Council's objectivity in making recommendations. *Id.* at 3398. The second change was designed to relieve the Council's dependence for staff on the Administration on Aging in the belief that the Council "could be more effective in obtaining information on advising the President and the Congress." *Id.* at 3399.

At no time in the long evolution of the present Council did Congress express any intent to limit presidential control, including removal, over the membership. Prior to the statutory authorization in 1965, of course, there could have been no serious contention whatsoever that the presidential appointees were not freely removable. And at no time in the course of enacting the various statutes creating or affecting the Council did Congress ever express a contrary belief or intent.

We do not regard the latest House report's use of the word "independence" as requiring a different conclusion.[1] The report specifically explains that the "independence" desired for the Council would affect its relationship to other federal agencies, especially the Commission on Aging, and not the President. This "independence," in terms of Council membership and staff, would avoid conflicts of interest and improve the objectivity and efficiency of the Council. Recognizing the President's power to remove creates no conflict of interest. Successor appointees must still exclude full-time federal employees. Nor does removal of the Council's members directly affect its staff. In any event, "independence" was desired with the specific intent to improve the Council's ability to perform its duty of advising the President. The relationship and responsiveness of the Council to the President was strengthened, not weakened. The removal power is consistent with this relationship.[2]

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[1] The concept of "independence" also appears in the context of the description of the Older Americans Advocacy Commission as created by the Senate version of the 1972 bill. Whatever was meant by the reference, however, the structure did not prevail in the conference committee, which adopted the House version. *See* S. Conf. Rep. No. 1287, 92d Cong., 2d Sess. 46 (1972). The bill, in any event, was vetoed.

III. Constitutional Analysis

We examine briefly the relevant principles of constitutional law by way of reinforcing our conclusion that the statute does not limit the President's power to remove Council members.[3]

We start with the long established rule that "[i]n the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment." *In re Hennen,* 38 U.S. (13 Pet.) 230, 259 (1839); *see also Myers* v. *United States,* 272 U.S. 52 (1926); *Sampson* v. *Murray,* 415 U.S. 61, 70 n.17 (1974). The mere specification of a term of office is not such a specific provision. *See Parsons* v. *United States,* 167 U.S. 324 (1897); *Martin* v. *Tobin,* 451 F.2d 1335 (9th Cir. 1971). Under the general rule, the President's power to appoint the Council members empowers him to remove them.[4]

Exceptions to this rule are narrowly defined. Congress can constitutionally restrict the President's power to remove a federal officer only if he or she is a member of a so-called "independent" agency, not part of the Executive Branch, and the agency's primary functions are quasi-legislative or quasi-judicial and "require absolute freedom from Executive interference." *Wiener* v. *United States,* 357 U.S. 349, 353 (1958); *see Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935).

Although closely allied to the Commission on Aging, which is established in the Office of the Secretary of Health and Human Services, *see* 42 U.S.C. § 3011(a) (1976 & Supp. III 1979), the Council is not expressly lodged within an executive department. The Council's functions, however, leave no doubt that it is executive in nature. We examine both what the Council does and what it does not do.

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[2] We attribute very little significance to the fact that the Council, as recently as 1978, was thought to be a source of advice to Congress itself. Congress may, of course, utilize its own committees for the gathering of information, or it may, through its own offices, appoint advisory committees to assist it in the performance of its legislative functions. If, however, Congress creates by statute an advisory body whose primary responsibility is to advise the Executive and, in doing so, Congress places the power of appointment in the President, we believe that Congress must be assumed to have been aware that as a practical matter, the appointees would be dependent on the President as appointing authority, rather than Congress, and that as a constitutional matter, the power of free removal would inhere in the structure chosen.

[3] The statute, of course, must be construed to avoid an unconstitutional result. *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749 (1961); *Crowell* v. *Benson,* 285 U.S. 22, 62 (1932).

[4] The requirement under the statute of Senate advice and consent to the presidential appointees does not in and of itself limit the President's power of removal. *Cf. Myers* v. *United States,* 272 U.S. 52, 119-25 (1926).

By congressional intent expressed in the legislative history and by design embodied in the statute, the Council is an advisory body. It was intended, and its duties as prescribed by statute effectuate the intent, that the Council advise, assist, review, evaluate, advocate, inform, and study. The recipients of the Council's advice, assistance, and recommendations are primarily the President, the Secretary of Health and Human Services, and the Commissioner on Aging;[5] and generally, the advice, assistance, and recommendations are intended to enhance the recipient's own performance of statutory responsibilities. In the context of examining the nature of the functions of another advisory body created to advise an executive department, the District Court for the District of Massachusetts recently recognized that giving advice and making recommendations "fall into the category of 'purely executive.'" *Martin* v. *Reagan,* 525 F. Supp. 110, 113 (D. Mass. 1981) (National Institute of Justice Advisory Board). *See also Patino* v. *Reagan,* Civil No. S-81-469 MLS (E.D. Cal. Sept. 29, 1981) (same).

If the executive nature of the Council's duties left any doubt regarding the inability of Congress to limit the President's power to remove its members, any such doubt is overcome by the fact that the Council performs no quasi-legislative or quasi-judicial functions as those functions are described in the cases. *See Humphrey's Executor* v. *United State, supra;*[6] *Wiener* v. *United States, supra.*[7] In short, there is no basis for concluding that the Council's functions "require absolute freedom from Executive interference." *Wiener,* 357 U.S. at 353.

In sum, the text and history of the statute, as interpreted in light of the relevant constitutional principles, impose no limitation on the President's power to remove members of the Council. The President, therefore, has authority to remove them at his pleasure.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

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[5] Reports to Congress are passed first to the President for his comments and recommendations. *See* 42 U.S.C. § 3015(f).

[6] Members of the Federal Trade Commission were held to be protected from removal because the Commission was "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." 295 U.S. at 628.

[7] Members of the War Claims Commission were held to be protected from removal because they had the responsibility to adjudicate claims against the United States "according to the law," *i.e.,* "on the merits of each claim, supported by evidence and governing legal considerations." 357 U.S. at 355.

Constitutionality of Federal Habitual Offender Legislation

Provisions of proposed "habitual offender" legislation would be within Congress' power under the Commerce Clause even though they may penalize activities which are entirely intrastate, if Congress has a rational basis for finding that these activities have some effect on interstate commerce.

November 13, 1981

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

This responds to your request for our views regarding the power of Congress to enact S. 1688. We will examine other constitutional implications of S. 1688 at a later date.

Section 2118(a) of S. 1688 (97th Cong., 1st Sess.) provides:

> Whoever commits, conspires, or attempts to commit a robbery or a burglary in violation of the felony statutes of a State or of the United States while using, threatening to use, displaying or possessing a firearm, after having been twice convicted of a robbery or a burglary in violation of the felony statutes of a State or the United States is a career criminal and upon conviction shall be sentenced to imprisonment for life.

The bill further provides that defendants accused under this provision shall be admitted to bail "only as provided in capital cases" and that sentences under this provision shall not be suspended. It requires that trials occur and appeals be decided within 60 days. Additionally, section 4 contains an expression of congressional intent that the federal government ordinarily defer to state prosecution, but that "if the Attorney General or a United States Attorney, in consultation with appropriate State or local officials, determines that there is a significant Federal interest in the case and the State authorities are unlikely to secure a sentence of imprisonment for life, then Federal prosecution may be brought."

At the outset, we would observe that the bill might be read to impose its substantive requirements on the states in the course of their conduct of state prosecution. Such an interpretation raises serious Tenth Amendment concerns. *See National League of Cities* v. *Usery,* 426 U.S. 833, 855 (1976). Although we read the bill as proposing only establishment of a federal offense, to be decided in the federal courts and having no impact on the right of the states to enforce their own criminal laws, we recommend that the language of the bill be made less ambiguous in this regard.

If Congress has the power to legislate as it proposes in S. 1688, that power is derived from the Commerce Clause, which permits Congress to "regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3. The clause grants the power to regulate not only the channels and instrumentalities of interstate commerce, but also those activities having an effect on interstate commerce. *Perez* v. *United States,* 402 U.S. 146, 150 (1971). Because S. 1688 does not contain a specific interstate commerce nexus as an element of the crime, it falls within the category of legislation regarding activities affecting interstate commerce.

Congress has often legislated in the criminal field by specifically prohibiting activities that occur in interstate commerce, but it also has legislated without requiring that a connection with interstate commerce be proved as an element of every crime. *See, e.g.,* 18 U.S.C. § 922(b), 1955. Its power to do so derives from a long line of cases holding that even purely intrastate activity may be regulated, where that activity "combined with like conduct by others similarly situated, affects commerce among the states. . . ." *National League of Cities* v. *Usery,* 426 U.S. 833, 840 (1976), *quoting Fry* v. *United States,* 421 U.S. 542, 547 (1975). *See, e.g., Wickard* v. *Filburn,* 317 U.S. 111 (1942).

Thus, Title II of the Consumer Credit Protection Act, which prohibits "extortionate credit transactions" or "loan-sharking," has been declared constitutional by the Supreme Court. *Perez* v. *United States,* 402 U.S. 146 (1971). In so holding, the Court noted that "[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce." 402 U.S. at 154. In considering Title II, Congress had received extensive testimony about the connection between loan-sharking and interstate organized crime. It made specific findings as to this connection and further found that "[e]xtortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce." 402 U.S. at 147 n.1.

Similarly, Congress enacted 18 U.S.C. § 1955, which makes it a federal offense to conduct, finance, manage, supervise, direct, or own a gambling business that: (1) is in violation of state or local law; (2) involves five or more persons; and (3) has operated for more than 30 days or takes in at least $2,000 per day. This statute has been upheld repeatedly as within Congress' power under the Commerce Clause. *See, e.g., United States* v. *Kail,* 612 F.2d 443, 449 (9th Cir. 1979), *cert. denied,* 445 U.S. 969 (1980); *United States* v. *Abramson*, 553 F.2d 1164, 1173 (8th Cir.), *cert. denied*, 433 U.S. 911 (1977); *United States* v. *Sacco*, 491 F.2d 995, 999–1001 (9th Cir. 1974) (*en banc*); *United States* v. *Harris*, 460 F.2d 1041, 1044–46 (5th Cir.), *cert. denied*, 409 U.S. 877 (1972). In considering the constitutionality of § 1955, the courts have applied the accepted test for determining whether Congress acted within its powers in prohibiting an entire class of activities as having an undesirable effect on interstate commerce: (1) "Whether Congress had a rational basis for finding that [the activity] affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258–59 (1964); *Sacco*, 491 F.2d at 999. The legislative history of § 1955, like that of Title II, revealed specific congressional findings about the connections between illegal gambling and organized crime and interstate commerce, as well as the need for federal involvement for effective control of the problem. *Sacco*, 491 F.2d at 999.

Congress has also specifically regulated intrastate transactions in firearms, *see* 18 U.S.C. §§ 921–928, "on the theory that such transactions affect interstate commerce." *See Huddleston* v. *United States*, 415 U.S. 814, 833 (1974); *Mandina* v. *United States*, 472 F.2d 1110, 1113–14 (8th Cir.), *cert. denied*, 412 U.S. 907 (1973); *United States* v. *Menna*, 451 F.2d 982, 984 (9th Cir. 1971), *cert. denied*, 405 U.S. 963 (1972). Section 922(d)(1), for example, prohibits the sale of firearms to those under indictment for or convicted of felonies, without a specific requirement that the individual sale be in interstate commerce. This section has been upheld as within Congress' powers under the Commerce Clause. *United States* v. *Nelson*, 458 F.2d 556, 559 (5th Cir. 1972).

As you noted in your October 26, 1981, statement to the Senate Judiciary Committee, it may be a sufficient basis for enacting S. 1688 that "[r]obberies and burglaries of homes, stores, businesses, and travelers directly interfere with interstate commerce by impeding the free flow of goods and people, and by affecting insurance rates, real estate values, and the general cost of operating businesses, among other things." *Career Criminal Life Sentence Act of 1981: Hearings on S. 1688, S. 1689, and S. 1690 Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 21 (1981) (statement of D. Lowell Jensen). On the other hand, this statement may be so generally applicable to state and local crimes as to be unpersuasive as a statement of the basis for enacting S. 1688. Although the courts have emphasized that Congress need not make particularized findings, *Perez*, 402 U.S. at 154; *Sacco*, 491 F.2d at 1000, the statutes discussed above have contained clear statements of the federal interest involved (in the statute or the legislative history), and it is uncertain how far the commerce power extends without such specific congressional consideration.[1]

Although we believe that the broad powers granted to Congress under the Commerce Clause would permit legislation like S. 1688 on the proper record, we are unable to say that S. 1688 would be considered within Congress' powers if the statute or its history is silent on this matter, or if Congress' asserted interest is one generally applicable to all crimes. While the commerce power is broad, it is not limitless. We do not believe that S. 1688, on its face, provides as certain a basis for congressional action as the three statutes discussed above. Therefore, while they provide support for enacting S. 1688, they do not decide the constitutional question definitively.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[1] In determining whether Congress acted within its powers under the Commerce Clause, some cases have emphasized Congress' perception that existing state control was inadequate. *See, e.g., United States* v. *O'Neill*, 467, F.2d 1372 (2d Cir. 1972). Although we do not believe that state inadequacy in a particular area is a requirement for Congress to legislate under the Commerce Clause, a congressional determination that state efforts are inadequate would not be unhelpful.

Obligation of the Office of the Vice President to Pay State or City Accommodations Taxes

The Office of the Vice Presidency is immune from state taxation by virtue of the Supremacy Clause of the Constitution, and is thus not required to pay a state or city accommodations tax on hotel bills for which it is billed directly.

November 19, 1981

MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE VICE PRESIDENT

This responds to your request for our opinion whether the Office of the Vice President (OVP) is required to pay accommodations taxes imposed pursuant to state law or city ordinance. The situation which has occasioned your inquiry is that in which OVP reserves a block of rooms for an official trip, is billed by and pays directly to the hotel. The hotel has sought to collect as well a state or city accommodations tax imposed on all hotel bills.[1] Under familiar principles of constitutional law, neither states nor cities may tax an instrumentality of the federal government. Thus OVP is, in the circumstances you describe, not required to pay the tax.

Since the early days of the Republic, the Supreme Court "has adhered to the rule that States may not impose taxes . . . the legal incidence of which falls on the Federal Government." *United States* v. *County of Fresno,* 429 U.S. 452, 459 (1977) citing *M'Culloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819). *See, e.g., United States* v. *Mississippi Tax Comm'n,* 421 U.S. 599 (1975); *First Agricultural Nat. Bank* v. *Tax Comm'n,* 392 U.S. 339 (1968); *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110 (1954). The federal government's immunity from state taxation is "inherent in the Supremacy Clause of the United States Constitution," and no levy may thus be imposed upon any of its activities without its consent. *United States* v. *County of Fresno, supra,* 429 U.S. at 453.

To be sure, the Court has also recognized the propriety of state taxes in certain situations where the economic incidence of the tax may be said to fall on the federal government. For example, in *United States* v. *County of Fresno, supra,* the Court ruled that a state may tax federal employees on their possessory interests in housing owned and supplied to them by the federal government as part of their compensation. In doing so, it noted that "[s]o long as the tax is not directly laid upon the Federal Government, it is valid if nondiscriminatory . . . or until Congress declares otherwise." 429 U.S. at 460. *See also Graves* v. *New York ex rel. O'Keefe,* 306 U.S. 466 (1939) (states may tax federal employee's wages); *James* v. *Dravo Contracting Co.,* 302 U.S. 134 (1937) (state may tax gross receipts of federal contractor); *City of Detroit* v. *Murray Corp.,* 355 U.S. 489 (1958) (state may tax private contractor's use of government-owned property). These cases make clear, however, that a state or city tax is proper only if "[t]he 'legal incidence' of the tax . . . falls neither on the Federal Government nor on federal property," and only if it does not "threaten[ ] to obstruct or burden a federal function." 429 U.S. at 464.

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[1] You have enclosed as an example of such a tax the Illinois Hotel Operators' Occupation Tax Act, which by its terms applies to all persons renting rooms "even if the person paying for the room may be a government agency or instrumentality (Federal, State or Local, or even a foreign government)." It is not significant for the constitutional issue that this tax is expressly imposed on instrumentalities of the federal government.

Because the state and city accommodations taxes described in your letter would fall directly on an agency of the federal government and "burden a federal function," OVP has no obligation to pay them.[2]

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[2] We note that the federal procurement regulations expressly state that "purchases made by the Government itself are exempt from State and local sales and use taxes. . . ." 41 C.F.R. § 1-11.302 (1980). Government agencies are directed to make use of this exempt status "to the fullest extent available. . . ." *Id.* It is true that under current administrative practice federal employees who secure and pay for hotel rooms while traveling on government business may be taxed, on the theory that the government is not a party to the transaction, even though the government is obligated to reimburse the employee for all of his expenses. *See, e.g.,* 55 Comp. Gen. 1278 (1976). We do not doubt that this practice could be changed to require that federal employees be exempted from state or local taxes in such situations.

Peace Corps Employment Policies for Pregnant Volunteers

The Pregnancy Discrimination Act (PDA) would prohibit the Peace Corps from implementing an across-the-board policy of terminating or reassigning volunteers solely because they become pregnant while assigned overseas, or because they have an abortion. A decision to terminate a pregnant volunteer must be based on a case-by-case assessment of the volunteer's ability to function effectively in her assignment while pregnant or after delivery of the child.

Under the PDA, the fact that a volunteer who has been terminated because of pregnancy chooses to have an abortion cannot be considered in a decision on her reapplication for service.

Even though a specific restriction in the Peace Corps' appropriation prohibits the use of its funds to perform abortions, so that the Peace Corps may not pay for the cost of an abortion for one of its volunteers, the PDA would require the Peace Corps to continue to pay travel and per diem expenses to volunteers evacuated to have an abortion, as long as it provides such compensation to other volunteers evacuated for comparable medical conditions. The Peace Corps must also allow volunteers to draw upon their accumulated readjustment allowance to pay for an abortion, if similar access is allowed for other medical expenses.

November 20, 1981

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, PEACE CORPS

This responds to your request for this Office's views on several questions about the Peace Corps' policies on hiring and reinstatement of volunteers who become pregnant while overseas and of pregnant volunteers who elect to have an abortion, and on reimbursement of travel and per diem expenses to volunteers evacuated to the United States for the purpose of obtaining an abortion. We conclude that the Pregnancy Discrimination Act would prohibit the Peace Corps from implementing any across-the-board policy of terminating volunteers who become pregnant while overseas or pregnant volunteers who elect to have abortions, but that in some limited circumstances termination or reassignment may be appropriate, on an *ad hoc* basis, because of the unique demands and constraints of Peace Corps service. We do not believe, however, that the Peace Corps may consider the fact that a volunteer who had been terminated because of pregnancy subsequently elected to have an abortion in reviewing that individual's application for reinstatement. With respect to the funding of abortion-related expenses, we conclude that the Peace Corps is not barred from using appropriated funds to pay travel costs and a per diem to volunteers who are evacuated for the purpose of obtaining an abortion, and, in fact, that the Pregnancy Discrimination Act requires the Peace Corps to continue paying those costs, so long as travel and per diem expenses are paid to volunteers evacuated for other comparable medical disabilities.

I. Background

Current Peace Corps policy provides for an *ad hoc* determination whether volunteers who become pregnant or pregnant volunteers who elect to have an abortion will be allowed to remain in their assigned countries. In determining whether a pregnant volunteer (including her spouse) should be allowed to remain in service, the Country Director looks at a variety of factors, including health hazards to the mother and child, the ability of the parents to support the child, and the prospects for continued effectiveness by the parents. A pregnant volunteer who elects to have an abortion may be separated, or returned to duty if the Country Director determines she will be able to serve effectively under the circumstances. Pregnant volunteers, volunteers with dependent children, and volunteers who have had abortions while in service do serve in the Peace Corps, although individuals who are pregnant or who have dependent children are not encouraged to become volunteers. Volunteers who choose to have an abortion are generally evacuated to the United States for the procedure. The Peace Corps pays travel expenses and a per diem to those volunteers who have an abortion, as it does for volunteers evacuated for other medical or surgical treatment.[1] Because of a prohibition in the Peace Corps' current appropriations authority against the use of appropriated funds to pay for abortions except where the life of the woman would be endangered or in cases of reported rape or incest, the Peace Corps does not now pay the costs of the abortion procedure itself. Volunteers may, however, draw upon accumulated readjustment allowance funds to pay for abortion procedures.[2]

You have asked us to address the following questions:

1. Can the Peace Corps terminate any volunteer who becomes pregnant while a volunteer because of pregnancy? If so, could such a policy be limited to single volunteers?

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[1] Payment of medical and related expenses for Peace Corps volunteers is authorized by 22 U.S.C. § 2504(e) (1976), which provides that "[v]olunteers shall receive such health care during their service . . . as the President may deem necessary or appropriate . . . ."

[2] Under the Peace Corps Act, codified at 22 U.S.C. § 2501–2523 (Supp. III 1979), volunteers are entitled to receive a readjustment allowance of $125 per month, payable on return of the volunteer to the United States. 22 U.S.C. § 2504(c). Amounts accrued as readjustment allowance may be paid to the volunteer, members of his family, or others during the period of the volunteer's service, "under such circumstances as the President may determine." The readjustment allowance is transferred on a monthly basis, to a noninterest bearing account until payment to the volunteer. For income tax purposes, the allowance is deemed paid to the volunteer when transferred to the fund from which the readjustment allowance is payable. *Id.*

2. Can the fact that a volunteer has a husband in-country be cause to allow a pregnant volunteer to remain in that status longer than she would if she were single?

3. Does payment for travel for a volunteer to return to Washington and per diem while here, leaving the payment for the abortion procedure up to the volunteer, comply with the legislative restriction on Peace Corps appropriations?

4(a). If a volunteer is terminated, asked to resign due to pregnancy, and subsequently obtains an abortion, can that fact be considered if she applies for readmission to the Peace Corps as a volunteer?

(b). Since a normal term for volunteers is two years, if the answer to (a) is "no," could the fact that a volunteer resigned more than once to have an abortion be considered upon her request for readmission?

II. Requirements of the Pregnancy Discrimination Act

The Peace Corps' termination, reinstatement, and benefits policies for pregnant volunteers or volunteers who have an abortion must comply with the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k) (Supp. III 1979). The PDA amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–16 (1976), to clarify Congress' intent that the sex discrimination prohibited by Title VII includes discrimination on the basis of "pregnancy, childbirth or related medical conditions."[3] The PDA provides that "women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ." The prohibition against discrimination does not require an employer to pay "health insurance benefits" for abortions, except where the life of the mother would be endangered if the fetus were carried to term, or where medical complications arise from an abortion.

Except for the express language allowing an employer to refuse to pay health benefits for abortion, the prohibition against discrimination contained in the PDA is to be read broadly to extend to "the whole range of matters concerning the child-bearing process," including pregnancy, miscarriage, abortions, and childbirth, and to the whole range of employment policies that can adversely affect pregnant workers, including "hiring, reinstatement, termination, disability benefits, sick leave, medical benefits, seniority and all other conditions covered by Title VII." *See* H.R. Rep. No. 948, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4752–53 (1978 House Report). Any employment practice or policy that treats pregnant employees differently from other disabled workers, with the exception of payment of health insurance benefits for an abortion, is a *prima facie* violation of the Civil Rights Act. *See Harriss* v. *Pan American World Airways, Inc.*, 649 F.2d 670, 673 (9th Cir. 1980); *see generally Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977).

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[3] The Pregnancy Discrimination Act applies to "volunteers serving under . . . the Peace Corps Act" by virtue of § 12 of the Domestic Volunteer Services Act, *as amended*, 42 U.S.C. § 5057(c)(1), with the exception of provisions affording aggrieved individuals a right of appeal to the Merit Systems Protection Board.

The courts have held that the *prima facie* test applies both to facially neutral policies or practices which have a disparate impact on pregnant employees, and policies or practices that single out pregnant employees for disparate treatment. *See, e.g., Harriss*, 649 F.2d at 673. An employer may show that facially neutral policies or practices are justified by and based upon a nondiscriminatory business purpose, although the employee may rebut that showing if other devices that do not have a similar discriminatory effect would serve that business purpose. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971); *Dothard*, 433 U.S. at 329. Where a policy or practice overtly discriminates against pregnant employees, it may be justified only if the employer can show that the discrimination is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e–2(e). The federal courts have consistently stated that this exception is "extremely narrow" and requires the employer to demonstrate, for example, that the discrimination is "reasonably necessary to the essence of his business,"[4] that he has a "factual basis for believing that all or substantially all [pregnant] women would be unable to perform safely and efficiently the duties of the job involved . . . ,"[5] or that it would be "impossible or highly impractical to deal with [pregnant women] on an individualized basis."[6] *See Harriss*, 649 F.2d at 676; *see generally Dothard*, 433 U.S. at 334.

It is important to note that the PDA does not require an employer to treat pregnant employees in any particular manner or to provide particular benefits for pregnant employees. Rather, it prohibits only *discriminatory* treatment that is not fully justified by the particular requirements of the job. Women disabled due to pregnancy, childbirth, or related medical conditions must be provided the same benefits and same employment consideration as those provided to other similarly disabled workers, but need not be provided any greater benefits or consideration. 1978 House Report at 4, 1978 U.S. Code Cong. & Ad. News at 4752. Thus, the initial question is whether the Peace Corps' current policies or the possible changes raised by your questions would be consistent with the treatment of other volunteers who are similarly affected in their ability to perform the major functions of their assignments. If any of those policies treats volunteers differently or has the effect of treating volunteers differently because of pregnancy (including volunteers who have abortions), it would be a *prima facie* violation of the PDA. The second level of inquiry would then be whether the discrimination is justified as a bona fide occupational qualification (if the policy discriminates on its face) or by business necessity (if the policy is facially neutral but discriminatory in impact).

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[4] *See Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976); *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

[5] *See Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969); *Diaz*, 442 F.2d at 388.

[6] *See Weeks*, 408 F.2d at 235 n.5.

III. Termination and Reinstatement

Under current policy, a Peace Corps volunteer may be separated from service before the end of his or her term for a variety of reasons, most of which involve a discretionary determination by the Country Director that the volunteer's continued effectiveness has been impaired. A volunteer may be terminated, for example, for use of illegal drugs or for excessive use of alcohol. Marriage is a ground for early termination in some instances, for example, if the volunteer marries another volunteer whose term has ended, or if a volunteer marries a dependent nonvolunteer and it is determined that the volunteer will be unable to support his or her spouse while in service. Marital separation or divorce is generally cause for reassignment of one volunteer, or, if no other suitable assignment is available, for termination of one volunteer. A volunteer may also be terminated for failure to adjust to the conditions of the assignment, unacceptable personal conduct, inadequate job performance, or lack of a suitable assignment. As noted above, a pregnant volunteer may be separated from service if the Country Director determines that continued service could present a health hazard for the mother or child, if the volunteer will be unable to support the family, or generally if having a child will impair the volunteer's continued effective service. A volunteer who obtains an abortion may be terminated if the Country Director determines she will not be able to serve effectively.

A. Pregnancy

We believe that, so long as a decision to terminate a pregnant volunteer is based on an assessment of the volunteer's ability to function effectively in her assignment *after* delivery of the child, the Peace Corps' current policy allowing discretionary termination of pregnant volunteers does not violate the PDA. We base this conclusion on our understanding that the same considerations are applied to any volunteer who has a dependent, including volunteers who have dependent children or spouses prior to entering the Corps, and volunteers who marry dependent spouses during service. The application of this policy, on an *ad hoc* basis, would thus not have a disparate impact on volunteers who become pregnant during their term overseas, and would not be discriminatory under the PDA. To the extent that the Peace Corps considers the marital status of any volunteer who has dependents as relevant to the volunteer's continued effectiveness in the assignment, we believe the Peace Corps may take into consideration a pregnant volunteer's marital status, and whether her spouse accompanies her in her assignment, in deciding whether termination is appropriate. Similarly, if the Peace Corps as a matter of policy or practice reassigns or terminates volunteers if continued service in a particular assignment would pose a health threat to the volunteer or his or her children, the Peace Corps may reassign or terminate a pregnant volunteer if a bona fide threat to her health or to the health of the child exists.

Under limited circumstances, we believe the Peace Corps could terminate or reassign a volunteer solely because she is pregnant, independent of the considerations outlined above. We can foresee the possibility that in individual cases a volunteer would not be able to function adequately during her pregnancy because of cultural biases in her assigned country. Because of the unique situation of Peace Corps volunteers, who must live and work in the culture of their assigned countries, in such a situation we believe the Peace Corps could exercise its discretion based on the facts of a particular case and remove the volunteer from her assignment. *See, e.g., Dothard,* 433 U.S. at 334 (1977).[7]

While the Peace Corps could terminate pregnant volunteers on a case-by-case basis for the reasons outlined above, we do not believe that the Peace Corps could, as a matter of overall policy, terminate pregnant volunteers solely because they become pregnant. Some recent decisions of lower federal courts have upheld policies requiring women to take mandatory leave beginning in the early stages of pregnancy, but those decisions turn on the narrow ground that continued employment of the woman during her pregnancy could pose a safety risk to coworkers and the public.[8] We have not been informed of a comparable factual basis that would justify an across-the-board policy of terminating pregnant volunteers. In fact, the Peace Corps' historic experience with pregnant volunteers who remain in service might undermine, if not preclude, an argument that such a policy is justified, even by the unique demands of the Peace Corps.

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[7] We would caution that the Peace Corps should remain evenhanded in application of its policies. Thus, to the extent that the Peace Corps can accommodate volunteers with dependents, for example by choice of assignments or personal leave, or reassigns volunteers if necessary to avoid cross-cultural concerns, it must extend the same consideration to volunteers who become pregnant and have children while in service.

[8] These cases have involved policies of major airlines requiring stewardesses to take mandatory leave upon learning of their pregnancy, or after the first few months of pregnancy. *See, e.g., Harriss,* 649 F.2d at 677; *Burwell* v. *Eastern Air Lines, Inc.,* 633 F.2d 361, 370 (4th Cir. 1980), *cert. denied,* 450 U.S. 965 (1981); *Dothard,* 433 U.S. at 336–37 ("male-only" requirement for prison guards in "contact" positions allowed because of unique security and control problems in Alabama prisons).

B. Abortion

We doubt that the Peace Corps would be able to make a showing under the PDA that would permit it to terminate a volunteer because she elects to have an abortion, so long as other volunteers who undergo surgery of a comparable nature are permitted to return to their assigned countries. The legislative history of the PDA and implementing guidelines promulgated by the Equal Employment Opportunity Commission (EEOC) state in categorical terms that a woman's decision to have an abortion cannot be the basis for termination of employment. *See* House Report at 7, 1978 U.S. Code Cong. & Ad. News at 4755 ("[N]o employer may, for example, fire . . . a woman simply because she has exercised her rights to have an abortion."); 29 C.F.R. Part 1604 (Appendix). Moreover, the experience of the Peace Corps with volunteers who have had abortions and have returned to service would substantially undermine any argument that a volunteer who has had an abortion would be unable to perform effectively. This would not necessarily preclude the Peace Corps from reassigning a volunteer who has had an abortion if women who have abortions are ostracized or otherwise condemned by the culture of her assigned country. That circumstance could justify removal of the volunteer from her assignment, if her continued effective service would be substantially impaired by that cultural bias (assuming the fact of her abortion were public knowledge). However, such circumstances may be rare, and might be grounds only for reassignment of the volunteer, not for termination.

We do not believe that under the PDA the Peace Corps could justify a refusal to rehire a volunteer who had been terminated because of pregnancy and subsequently chose to have an abortion. Even if the ostensible reason for the refusal to rehire that volunteer were to avoid disruption caused by repeated breaks in service, or because of questions raised about the volunteer's commitment to serve her full term,[9] it would be difficult to overcome the inference that the volunteer was accorded different consideration in the employment decision because she became pregnant and chose to have an abortion, and might become pregnant and choose to have an abortion again in the future. One of the primary purposes of the PDA revealed in its legislative history is to prevent employers from acting on the basis of such stereotypes, *i.e.*, that all women of child-bearing age are "potentially pregnant." *See* 1978 House Report at 6–7, 1978 U.S. Code Cong. & Ad. News at 4754–55; *Weeks*, 408 F.2d at 235–36. Thus, we conclude that under the PDA the fact that a volunteer chose to have an abortion cannot be considered in a decision on her reapplication for service.

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[9] Among the standards of selection for Peace Corps volunteers is "[m]otivation indicating commitment to serve a full term (usually 2 years) as a volunteer despite periods of stress." 22 C.F.R. § 305.3(a).

III. Reimbursement of Expenses

You have also asked whether the Peace Corps must, or indeed can, consistent with the PDA and current restrictions on the use of appropriated funds, continue to pay travel costs and a per diem for volunteers who obtain an abortion while in service. The Peace Corps now pays those costs under a general policy providing for evacuation to the United States of volunteers who require "elective (necessary but not emergency) surgery of any consequence."[10] Until the beginning of FY 1979, the Peace Corps also paid for the costs of the abortion procedure itself. In 1978, Congress included language in the Peace Corps' appropriations legislation limiting the use of appropriated funds for abortions. We understand that the currently effective language is contained in Pub. L. No. 96–536, § 109, 94 Stat. 3166, 3170 (1980), and prohibits the use of funds "to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for victims of [reported] rape or incest . . . or for medical procedures necessary for the termination of an ectopic pregnancy."

On its face, this restriction covers only payments made "to perform abortions"; it does not prohibit the use of funds to pay expenses, such as a per diem or travel expenses, that are incidental to the abortion. We believe that the plain language of the appropriations restriction is dispositive, and does not require the Peace Corps to cease payment of incidental expenses other than the costs of the abortion itself.[11]

This does not, however, dispose of the question whether the Peace Corps, in its discretion, may cease payment of travel and per diem expenses for volunteers who elect to have abortions. The statutory authority for payment of those expenses vests broad discretion in the President or his delegated representative to authorize "such health care

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[10] The current policy set forth in the Peace Corps manual identifies a number of other factors that require evacuation to the United States, including: difficult diagnostic problems; cases requiring difficult treatment; psychiatric problems that are the primary reason for evacuation or that threaten to complicate the medical management of the case; cases involving a long recuperative period; and cases that can be handled more effectively and at lower cost in the United States than at an intermediate point. Evacuation to intermediate locations is suggested for a number of other problems, including: emergency surgery; elective surgery requiring short-term hospitalization or treatment on an outpatient basis; specialist consultations; simple orthopedic procedures; and treatment if a long recuperative period is not anticipated.

[11] Moreover, as we note below, any broader interpretation of the appropriations restriction would conflict directly with the requirements of the PDA. This inconsistency would raise a substantial question of congressional intent, because the latter-passed bill (the appropriations legislation) does not address the continuing applicability of the PDA. In general, repeals by implication are not favored, especially when the subsequent legislation is an appropriations measure. *See, e.g.*, *TVA* v. *Hill*, 437 U.S. 153, 189–90 (1978). To the extent possible, therefore, we must interpret the restriction on the Peace Corps' appropriated funds consistently with the PDA—*i.e.*, to prohibit only the use of funds to pay for the abortion procedure itself.

. . . as [is] necessary or appropriate." 22 U.S.C. § 2540(e). We believe this authority is broad enough to allow termination of such payments. It must, however, be read in light of the non-discrimination requirements of the PDA.

We conclude that under the PDA the Peace Corps must continue to pay travel and per diem expenses for volunteers evacuated to have an abortion, so long as it provides such compensation for other volunteers evacuated for comparable medical conditions. As noted above, the PDA expressly exempts from its coverage payment of "health insurance benefits for abortion," except where the life of the mother would be endangered or "medical complications" arise. Because the Peace Corps in effect acts as a self-insurer for the volunteers, this exclusion is consistent with the restriction on use of appropriated funds discussed above.[12] However, the legislative history of the PDA makes it clear that Congress intended the exclusion of abortion benefits to be limited to benefits for the abortion itself, and not to include incidental benefits available to employees with comparable temporary disabilities. The amendment excluding abortion benefits from the scope of the PDA was adopted during consideration of the bill by the House Education and Labor Committee. The version adopted by the House Committee, and subsequently by the House, provided as follows:

> As used in this subsection, neither 'pregnancy' nor 'related medical conditions,' as they relate to eligibility for *benefits under any health or temporary disability insurance or sick leave plan* available in connection with employment, may be construed to include abortions, except where the life of the mother would be endangered if the fetus were carried to term . . .

124 Cong. Rec. 21,435 (1978) (emphasis added). As drafted, the bill would have permitted an employer to deny not only payment for the abortion itself, but also incidental benefits such as sick leave and disability. *Id.* at 21,436 (remarks of Rep. Hawkins). The Senate version of the bill contained no exclusion for abortion benefits.

In conference, a compromise was reached on the language that appears in the enacted bill. Senator Javits' remarks on the floor in support of the conference report clearly indicate that the intended scope of the exclusion was narrow:

> [T]he conferees have adopted a compromise which requires the provision of sick leave and disability benefits in

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[12] Although the language of the PDA refers only to "health insurance benefits," the legislative history indicates that the underlying concern was that employers would be required to *pay for* abortions (whether directly or through insurance plans), even if that employer harbored religious or moral objections to abortions. *See* 1978 House Report at 7, 1978 U.S. Code Cong. & Ad. News at 4755.

> connection with an abortion on the same basis as for any other illness or disabling condition.
>
> On the other hand, employers are not in any case required to provide health insurance benefits for the performance of the abortion procedure itself. . . .
>
> * * * * *
>
> Finally, since the abortion proviso specifically addresses only health insurance, the proviso in no way affects an employee's right to sick pay or disability benefits or, indeed, the freedom from discrimination based on abortion in hiring, firing, seniority, or any condition of employment other than medical insurance itself.

124 Cong. Rec. 36,818–19 (1978) (remarks of Senator Javits).

Thus, it is clear that, while an employer may refuse to pay the *costs* of the abortion, under the PDA that employer cannot refuse to provide to women who elect to have an abortion other benefits that are available to temporarily disabled workers. Here, the Peace Corps' evacuation policy, including the payment of travel expenses and a per diem allowance, is such an incidental benefit, and must be extended to volunteers who elect to have an abortion. We believe that the Peace Corps must also continue to allow volunteers to draw on their accumulated readjustment allowance in order to pay for the abortions if they so desire, so long as other volunteers are allowed similar access to cover medical expenses not otherwise covered by the Peace Corps.[13] This would not preclude the Peace Corps from altering its current reimbursement policy to provide, for example, for evacuation to an intermediate location, or to eliminate or reduce per diem payments, provided the amended policy applies across the board to all temporarily disabled workers, and not just to volunteers who become pregnant or have an abortion.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[13] We do not believe that allowing volunteers to use those funds would contravene the restriction on the Peace Corps' use of appropriated funds "to perform abortions." Although the readjustment allowance is not required to be paid to the volunteer until the end of his or her term of service, those funds are effectively held for the account of the volunteer and are taxable to the volunteer as accrued. *See* n.2 *supra*. Thus, withdrawal from those funds to pay the costs of an abortion would not be payment from funds appropriated generally for the Peace Corps, but rather payment to the volunteer of amounts owing to him or her.

Applicability of 18 U.S.C. § 281 to Selling Activities of Retired Military Officers

Section 281 of Title 18, United States Code, which prohibits certain representational activities by federal employees, is presently in force as applied to retired officers of the armed forces, and in appropriate cases a violation could warrant criminal prosecution by the Department of Justice.

The prohibitions of the first paragraph of § 281 apply only to retired officers on active duty, but under its second paragraph inactive retired officers are also prohibited from engaging in certain selling activities.

The prohibition in the second paragraph of § 281 was intended generally to prevent retired officers from being in a position to exert their influence in the procurement process of the military department in which they once served, and applies to representational activities in connection with the sale of services as well as the sale of goods. However, its prohibition does not extend to a situation in which the retired officer can fairly be said to be representing only himself and no one else as a seller.

November 30, 1981

MEMORANDUM OPINION FOR THE CHIEF, LITIGATION DIVISION, OFFICE OF THE JUDGE ADVOCATE GENERAL OF THE ARMY

This responds to your request that we clarify the position of the Department of Justice on several issues relating to the interpretation and enforcement of 18 U.S.C. § 281. In particular, you ask (1) whether and under what circumstances the Department of Justice would prosecute an alleged violation of § 281; (2) whether that statute's prohibitions apply only to retired officers on active duty or to those not on active duty as well, and (3) whether we regard its prohibitions as extending to the sale of services as well as the sale of goods.

Section 281 reads as follows:

> Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United

> States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.
>
> Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.
>
> This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by Act of Congress.

In 1962, as part of the general revision and recodification of the laws relating to conflicts of interest, this provision was repealed "except as [it] may apply to retired officers of the armed forces of the United States." Pub. L. No. 87–849, § 2, 76 Stat. 1119, 1126. As you note, there has been considerable controversy over exactly how this statute "may apply" to retired military officers.

The response to the first of your questions is contained in a letter from D. Lowell Jensen, Assistant Attorney General, Criminal Division, to Senator Strom Thurmond, Chairman, Committee on the Judiciary, July 7, 1981. Responding to Senator Thurmond's request for comments on a proposal to repeal § 281 and its companion statute 18 U.S.C. § 283, the Assistant Attorney General stated that "we believe the two statutes are presently in force and properly denote federal crimes." He also stated that while "prosecution would not ordinarily be undertaken . . . in the absence of evidence of venal conduct" and while "most of the matters involving these statutes can be effectively dealt with administratively," nonetheless "an aggravated case could warrant criminal prosecution . . . ."

Your second question is whether the prohibitions of § 281 are limited to retired officers on active duty or whether they are applicable as well to retired officers not on active duty. We believe that the prohibitions of the first paragraph of § 281 apply in full force only to active duty retired officers, but that under its second paragraph inactive retired officers are also prohibited from engaging in certain activities.

In 1939, the Court of Appeals for the District of Columbia held that all retired military officers, whether or not on active duty, are "officers" of the United States and subject to all conflicts laws from which they have not been exempted. *See Morgenthau* v. *Barrett,* 108 F.2d 481

(D.C. Cir. 1939), *cert. denied,* 309 U.S. 672 (1940). The following year, in response to the holding in the *Barrett* case, Congress added the second paragraph to § 281 to effect this exemption for retired officers not on active duty. The first sentence of the paragraph exempted inactive retired officers from the full force of the first paragraph. However, the second sentence of the paragraph limited the scope of this exemption, so that a retired officer not on active duty was left subject to a narrowly defined prohibition: he was forbidden to "represent any person in the sale of anything to the Government through the department in whose service he holds a retired status." [1]

This reading of the text of § 281's second paragraph is supported by the legislative history of the 1940 amendments. *See* H.R. Rep. No. 2330, 76th Cong., 3d Sess. 1 (1940) (hereafter 1940 House Report) (second sentence "intended to continue the prohibition against the sale of anything to a department by an officer formerly actively connected with that department."). *See also* H.R. Rep. No. 748, 87th Cong., 1st Sess. 10–11 (1961). And, every court which has dealt with the statute has concurred in this interpretation of its reach. *United States* v. *Gillilan,* 288 F.2d 796 (2d Cir. 1961), *cert. denied sub nom. Apex Distributing Co.* v. *United States,* 368 U.S. 821 (1961); *Taussig* v. *McNamara,* 219 F. Supp. 757 (D.D.C. 1963), *cert. denied,* 379 U.S. 834 (1964). *See also Field* v. *Brown,* 610 F.2d 981 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 939 (1980).

The status of active duty retired personnel was unaffected by the 1940 amendment, and they remained subject to all of the prohibitions of the first paragraph of § 281.

As previously noted, § 281 was repealed in 1962 "except as [it] may apply to retired officers of the armed forces of the United States." 76 Stat. at 1126. By its terms, this partial repeal left an active duty retired officer subject to all of the prohibitions of the first paragraph of § 281, and an inactive retired officer subject to the second paragraph's bar against selling back to the department in which he had served. At the same time, Congress expressly exempted inactive retired officers from the provision which replaced § 281. *See* 18 U.S.C. § 206. The legislative history of the 1962 revision makes clear that Congress believed the status of inactive officers was not affected by the new law. *See* H.R. Rep. No. 748, 87th Cong., 1st Sess. 10–11 (1961).[2] Accordingly, retired officers not on active duty remain subject to the limited prohibition contained in the second paragraph of § 281. Active duty retired officers are now somewhat anomalously subject to the virtually identical prohibitions of both the old and new versions of the law.

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[1] Section 283 is similarly structured, and a similar analysis can be applied to determine who is covered by it and what activities it prohibits.

[2] The cited portion of the House report states:

> The problems involved in the peculiar status of retired officers of the Armed Forces while not on active duty are of a complexity that requires further specialized study for solution. The committee therefore determined to omit this class of persons from the bill. Accordingly, the bill provides (sec. 206) that sections 203 and 205 shall not apply to a retired officer of the armed forces of the United States while not on active duty. What is more, the bill does not repeal present section 281 or 283 insofar as they may apply to such retired officers. In consequence, the present legal status of this group is wholly unaffected by the bill.

Your third question is whether § 281 prohibits the sale of services as well as the sale of goods and, if it does, whether it would preclude a retired officer's contracting with the Army for his own services. Taking the latter part of your question first, this Department has consistently taken the position that § 281 does not extend to a situation in which a retired officer "represents" only himself and no one else as a seller, whether the sale involves goods or services. This conclusion is implicit in the substantive prohibition of § 281, which bars the receipt of compensation for services rendered. *See also United States* v. *Gillilan,* 288 F.2d at 797, a criminal prosecution involving § 281, where Judge Learned Hand noted that a violation of the statute would occur if the retired officer "is representing someone else" in the sale of anything to his own former department.

We recognize that this distinction between representing only oneself and representing others as well is not always easy to maintain. This is highlighted by your hypothetical questions about services provided by a corporation in which the retired officer is a shareholder. The answer in each case depends on the facts; that is, whether the officer can fairly be said to be representing only himself, or is representing someone else besides or in addition to himself. As a rule of thumb, we would counsel retired officers to avoid representing corporations in any such selling situations.

A more difficult problem is presented by the question whether the second paragraph of § 281 is intended to reach the sale of services at all. Several years ago, responding to a request from the Acting General Counsel of the Department of Defense, this Office left open the question, citing "a sharp division of opinion" within the Department of Justice on the matter. *See* letter from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, to L. Niederlehner, January 21, 1974. That division of opinion no longer exists. While the question is not entirely free from doubt, we believe that the second sentence of the second paragraph of § 281 should be interpreted to prohibit a retired officer's representing some other party in connection with a contract for the sale of services as well as one for the sale of goods.

The language of the second paragraph of § 281 has been said to be ambiguous with respect to whether representational activity in connection with service contracts was intended to be prohibited. On the one hand, the phrase "sale of anything" can reasonably be interpreted literally to include the sale of services as well as the sale of goods. On the other hand, at common law a "sale" does not include a sale of services. *See, e.g., Five Per Cent Cases,* 110 U.S. 471, 478 (1884). When read in the context of § 281 as a whole, we think the literal interpretation, with the emphasis on "anything," more persuasive. The substantive prohibition of the first paragraph of § 281 bars any services rendered in connection with *any* matter in which the United States "is a party or directly or indirectly interested,'" including contracts for the sale of services. The prohibition of the second paragraph is more narrowly drawn to apply only to sales activities, and then only those made through the officer's own former department. The policy served by this more narrow prohibition is to prevent retired officers from being in a position to exert their influence in the procurement process of the military department in which they once served. We can think of no sensible reason why it should be applied selectively depending upon the nature of the contract involved. The narrower interpretation would apply to a contract for the purchase of equipment, but not to a contract for maintenance service on that equipment—an anomalous result.

This literal reading of the text of the statute finds support in its legislative history. The 1940 legislative action which added the second paragraph to § 281 was prompted by the broad reading given the predecessor of § 281 by the Court of Appeals for the District of Columbia in *Barrett, supra,* 108 F.2d 481. In that case a retired Army officer practicing law in New York sued unsuccessfully to gain admission to practice before the Department of the Treasury. In denying his petition on grounds that the activity would constitute a crime, the court of appeals expressed its opinion that the policy behind the law, and common sense, would dictate an opposite result:

> Much, we think, may be said in reason and common sense in favor of petitioner's application. To us it seems a far cry to attribute to a former captain in the military service, twenty years removed from that service, whose activities are wholly separated from military life, ability to exert a sinister influence in some matter pending in one of the departments of government. But this, for whatever it may be worth, must be addressed to the legislature and not to the courts.

108 F.2d at 484. The following year the House Committee on Military Affairs reported out legislation intended to meet the concerns expressed by the court of appeals. *See* 1940 House Report at 3. At the same time, the Committee recognized that it would be unwise to lift the bar of § 281 entirely, and so added an amendment in the form of a proviso to its broad exemption for retired military officers not on active duty. Under this proviso, the substantive prohibition of § 281 would continue to apply to a retired military officer only in connection with "the sale of anything" to his own former department.

The proviso was explained in the House report in the following terms:

> The amendment adopted by the committee is intended to continue the prohibition against the sale of anything to a department by an officer formerly actively connected with that department. It applies only to representation in the actual sale of goods, and does not apply to employment and the other activities of any corporation or other person such as manufacturing.

1940 House Report at 1. We recognize that the reference in the second sentence quoted above to "the actual sale of goods" could be and has been construed as expressive of an intention to apply the substantive prohibition of § 281 only to a particular class of selling activity. *See, e.g.*, Navy Judge Advocate General's Reference Guide to Employment Activities of Retired Naval Personnel, June 1969, at 28. However, the statement of what the amendment does *not* apply to ("employment and the other activities of any corporation . . . such as manufacturing") indicates that the House Committee intended to distinguish selling activities generally (which it intended to prohibit) from other kinds of activities barred by the first paragraph (which it did not). In other words, we believe that a construction of the word "only" in this sentence to refer to "representation" and not to "the actual sale of goods" is more consistent with the history and purpose of the statute. This reading better effectuates the purpose of the proviso to prevent retired military officers from exerting their influence in the procurement process of the military department in which they once served.

An interpretation of § 281 to cover service contracts is supported by a comparison with its nearest civil analogue, § 801(c) of Title 37. The latter statute denies retired pay to a retired regular officer who is engaged in selling "supplies or war materials" to any agency of the Department of Defense, the Coast Guard, the Environmental Science Services Administration, or the Public Health Service. A predecessor of this civil statute was in existence in 1940 when § 281 was amended to prohibit representation "in the sale of anything." [3] Had Congress intended to confine the meaning of "anything" in § 281 to tangible goods, we think it would have so stated.

We are not troubled by the lack of parallelism in the two statutes in this respect, since their respective scopes differ in several other ways. For example, unlike § 281, § 801(c) prohibits self-representation. Section 801(c) also reaches selling activities involving agencies other than the military department in which the retired officer formerly served.

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[3] *See* § 9 of the Act of July 22, 1935, 49 Stat. 490 (prohibiting payment of retired pay to any retired officer of the Navy or Marine Corps who for himself or others engages in selling "naval supplies or war material" to the Navy).

In light of this Department's now uniform position on the question of the continued vitality of § 281, there would appear to be no need to respond to your final question respecting the authority of the military departments, independent of § 281, to promulgate regulations prohibiting retired officers from selling to their former departments.

The Department's Criminal Division has reviewed and concurs in the statements and conclusions contained in this letter.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Illiterate Aliens Seeking Admission as Immigrants

Illiterate aliens who would otherwise be eligible for admission to this country on visas allocated under 8 U.S.C. §§ 1152 or 1153, may not avoid the literacy requirement of 8 U.S.C. § 1182(a)(25) simply by virtue of their being accompanied by a child who is under the age of 16, if that child's own eligibility for admission depends upon that of his or her parents. The State Department's longstanding administrative practice in this regard finds no support in the legislative history of the literacy requirement, which establishes that Congress intended to exempt from its application only those illiterates whose close relatives were independently entitled to be admitted.

December 2, 1981

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE

This responds to your request for assistance in resolving a conflict between the Department of State and the Immigration and Naturalization Service (INS) involving the provision of the Immigration and Nationality Act (Act) excluding illiterate aliens, Act, § 212(a)(25), 8 U.S.C. § 1182(a)(25),[1] and the exception to that section. Act, § 212(b), 8 U.S.C. § 1182(b).[2] You have asked whether an illiterate alien who is attempting to enter the country on a visa allocated under 8 U.S.C. §§ 1152 and 1153 ("quota visa") is eligible for a waiver of the literacy requirement if he is accompanied by a son or daughter who is under the age of 16.[3] The argument, as articulated by the State Department, is as follows: The illiterate alien receives a preference number because of his status—for example, as the brother of a United States citizen, 8 U.S.C. § 1153(a)(5)—while his admissibility is determined under 8 U.S.C. § 1182. His child, who will receive a visa because of his parent's quota visa, 8 U.S.C. § 1153(a)(8), is an "admissible alien" under 8 U.S.C. § 1153(b) since he is not barred by any of the conditions in 8 U.S.C. § 1182(a)(1)-(33). Simultaneously, therefore, the illiterate alien becomes "the parent . . . of an admissible alien" who is "accompanying such admissible alien" as provided for in 8 U.S.C. § 1182(b)(1), and his illiteracy may be ignored, while the child becomes entitled to a visa based on his parent's eligibility for a quota visa. This position is set out in the Foreign Affairs Manual, although the example used there involves a husband and wife.[4]

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[1] This section states:

> (a) Except as otherwise provided in this [Act], the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: . . . (25) Aliens . . . over sixteen years of age, physically capable of reading, who cannot read and understand some language or dialect.

8 U.S.C. § 1182(a)(25).

[2] The exception reads:

> The provisions of paragraph (25) of subsection (a) . . . shall not be applicable to any alien who (1) is the parent, grandparent, spouse, daughter, or son of an admissible alien, . . . if accompanying such admissible alien, or coming to join such citizen or alien lawfully admitted, and if otherwise admissible. . . .

8 U.S.C. § 1182(b).

[3] This question was apparently triggered by a request from within INS for an advisory opinion on the issue. Memorandum for Associate Commissioner Wack from Deputy General Counsel Schmidt, January 17, 1979. The State Department thereafter submitted a comprehensive memorandum outlining its views. Memorandum for Deputy General Counsel Schmidt from Cecil H. Brathwaite, Acting Chief, Advisory Opinions Section, Visa Services Directorate, December 12, 1980 (Brathwaite Memorandum). INS prepared a further response, Memorandum for Deputy General Counsel Schmidt from Staff Attorney Masterson, July 14, 1981 (Masterson Memorandum), on which the State Department, at the invitation of this Office, submitted comments. Memorandum for Assistant Attorney General Olson from Cecil H. Brathwaite, Chief, Advisory Opinions Section, Visa Services Directorate, September 30, 1981 (State Memorandum).

We believe that this position is incorrect and that the illiterate alien is not eligible for such a waiver.

I. Background

The State Department, through its consular offices overseas, has primary responsibility for issuing visas to those who wish to enter the United States as immigrants. 8 U.S.C. § 1201. For over 2 decades, these consular offices have relied on the position outlined above and have issued quota visas to illiterate aliens as long as they were accompanied by a child under 16, or a literate spouse.[5] Brathwaite Memorandum, at

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[4] Benefit of section 212(b) in certain cases.

> The finding of ineligibility of an alien under section 212(a) (25) of the Act has no bearing on entitlement to an approved preference status. An alien on whose behalf a relative petition has been filed, but who has been found ineligible under 212(a)(25), becomes eligible for the benefits of section 212(b) by virtue of marriage to a literate person who is not otherwise ineligible for a visa. The literate spouse from whom this eligibility derives is simultaneously entitled to the preference status of his ineligible spouse and is thereby an "eligible alien" within the meaning of 22 C.F.R. 42.91(25)(i)(d). If visa numbers are available for persons in the approved preference status, the couple may apply for immigrant visas.

9 Foreign Affairs Manual, § 42.91(a)(25) note 3.

[5] One issue, raised by INS, is whether the State Department actually adopted this position in the late 1950s. We have examined the material and believe that the State Department has held this position since at least 1960. In an Operations Memorandum (OM) dated March 25, 1960, sent to the consul in Naples, Italy, the Department approved issuance of a first preference visa to a Mr. Cifrodelli who was accompanied by his wife and children. Since both parents were illiterate, they were "*prima facie* ineligible to receive immigrant visas." OM, at 2. All the Cifrodelli children were under 16, and were "not stated to be ineligible on any other grounds and therefore may be presumed to be 'admissible aliens' in their own right." *Id.* "The problem is then resolved into the single question: being admissible aliens, may the illiterate children confer upon their illiterate parents, if accompanying them, the benefits of Section 212(b)(1) of the Act cited? The Department finds that they may do so, that there is nothing in the law which requires a contrary finding. Consequently, Mr. and Mrs. Cifrodelli are to be considered as not ineligible to receive immigrant visas even though they are illiterate aliens." *Id.*

The June 6, 1980, letter from the State Department to Rep. Walter (then chairman of the House Judiciary Committee's Subcommittee on Immigration and Naturalization) addressed another point—the issue of whether an illiterate alien like Mr. Cifrodelli could be eligible at all for a first preference visa, which was supposed to be reserved for highly skilled individuals. The letter confirmed that the OM cited above "was correct insofar as the technical matters are concerned, which were the sole subject of the advisory opinion . . . . [T]he question put to the Department related exclusively to the aliens' eligibility to receive visas in view of their illiteracy." June 6 letter, at 4.

Continued

10–12. Moreover, the State Department believes that INS has concurred with this interpretation during this entire period. *Id.* INS denies that it ever agreed with this argument and has taken the position that permitting the child to confer eligibility on the parent is a bootstrap construction of the statute that violates congressional intent. Masterson Memorandum, at 11–14. Because of this dispute, the State Department has suspended the issuance of quota visas to applicants whose exemption under § 1182(b) is based on an accompanying child or spouse.

We have carefully reviewed all the memoranda submitted. We recognize that the State Department has acted in good faith on its interpretation for a number of years. Because we are reluctant to overturn decades of administrative practice,[6] we have made an exhaustive canvass of the literacy provision's legislative history in an effort to find support for the State Department's interpretation. We have also examined the scanty case law on this issue.[7] Because of our findings, we are forced to conclude that the State Department's interpretation is inaccurate and that the INS' position is correct.

II. Legislative History

The literacy provision has a long history. Although it did not become law until 1917, it had been the subject of fierce debate for over 20 years. Three times Congress enacted immigration bills containing a literacy test—1897, 1913, and 1915—only to have them vetoed in turn by Presidents Cleveland,[8] Taft,[9] and Wilson.[10] By that time, it was fair

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Further, in a June 22, 1960, letter from the State Department to INS, the Director of the Visa
Office stated that the Cifrodelli case had raised the problem of whether "one alien can confer a certain
status on another alien from whom he in turn must derive a benefit under the immigration laws in
order to apply for and receive a visa." June 22 letter, at 1. The letter said that the issue had been
resolved by a reference to two prior cases in which visas were issued simultaneously in order to
confer cross-eligibility under other provisions of the Act.

There is no doubt, therefore, that the State Department has held its position for a number of years.

[6] A second issue raised by the State Department is whether INS has concurred in this interpreta-
tion. On July 3, 1957, INS wrote to the State Department and said: "It is the view of the Service that
an illiterate parent can benefit from the provisions of Section 212(b) regardless of the age of the
accompanying child and provided, of course, that the accompanying child is fully admissible." We
believe that the letter addresses another issue, and that the reference to the fact that the child must be
"fully admissible" is too ambiguous to be interpreted in support of either position.

INS inspectors at the border apparently rely on the investigations conducted by the consular office
issuing the quota visa and do not usually act to confirm the immigrant's *bona fides*, unless there is some
obvious problem. Conversation with Deputy General Counsel Schmidt, November 20, 1981. This has
apparently allowed the problem to go unnoticed for a number of years, despite the fact that both
immigration and consular officers are authorized to conduct the literacy test. 8 U.S.C. § 1182(b).

[7] *See United States ex rel. Azizian* v. *Curran*, 12 F.2d 502, (2d Cir. 1926); *United States ex rel. Barone*
v. *Curran*, 7 F.2d 302 (2d Cir. 1925); *In re F–*, 2 I. & N. Dec. 260 (1945). *See also United States ex rel.*
Engel v. *Tod*, 294 F. 820 (2d Cir. 1923); *In re Gaglioti*, 14 I. & N. Dec. 677 (1974); *In re Khan*, 14 I. &
N. Dec. 122, *aff'd, sub nom. Santiago* v. *INS*, 526. F.2d 488 (9th Cir. 1975), *cert. denied*, 425 U.S. 971
(1976).

[8] 29 Cong. Rec. 2667 (1897).

[9] S. Doc. No. 1087, 62d Cong. 3d Sess. (1913).

[10] H. Doc. No. 1527 (1915), *reprinted at* 52 Cong. Rec. 2481 (1915). The literacy test was also considered in 1898, 1902, and 1913, *see* 52 Cong. Rec. 3014 (1915), but did not pass both Houses in those years.

to describe the literacy test as "the bitterest bone of contention in the bill." 53 Cong. Rec. 4869 (1916) (statement of Rep. Mann). The fourth attempt to override the veto of a restrictive immigration law occurred in 1917 when President Wilson again vetoed the bill. H. Doc. No. 2003 (1917), *reprinted at* 54 Cong. Rec. 2212–13 (1917). That year, however, the supporters of restrictive immigration had sufficient votes to override the veto, and the bill became law.

Tracing the literacy test over the years, it is clear that it was an expression of strong anti-immigrant sentiment. It was specifically designed to curtail the flow of immigrants from southern Europe and Russia, whose background was felt to be incompatible with American institutions. Since these were also the groups with the highest rate of illiteracy, it was felt that the quickest and most efficient way to stem the flow was through a literacy test. Although opponents argued that it was discriminatory, not a fair test of character, and a repudiation of American ideals, its supporters retorted that diminishing resources necessitated a more limited admissions policy. In view of the clear statements by the bill's proponents that they wanted this provision in order to exclude as many aliens as possible, we do not believe, as the State Department does, Brathwaite Memorandum, at 9, that there is any evidence of a congressional desire to have the provision's exception interpreted liberally.

When first considered by the House in 1896, the exclusion provision contained an exemption only for parents of admitted aliens.[11] "The reason for the exemption of parents whose children have preceded them hither is obvious, and this provision requires no explanation further than that it was prompted by humane considerations." H.R. Rep. No. 1079, 54th Cong., 1st Sess. 2 (1896).[12] This humanitarian concern was repeated in 1912, when the provision was again considered.[13] "[P]ractically the identical bill" was passed again in 1915, and vetoed by President Wilson. 52 Cong. Rec. 50 (statement of Sen. Smith). *See supra* n.10. Finally, in 1917, Congress, after weeks of vitriolic debate[14] and over President Wilson's second veto, passed a law excluding illiterate aliens. Act of February 5, 1917, § 3, 39 Stat. 874, 877 (1917).[15]

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[11] "But no parent of a person now living in, or hereafter admitted to, this country shall be excluded because of his inability to read and write." 28 Cong. Rec. 5417 (1896).

[12] The Senate expanded the exception to cover grandparents, 29 Cong. Rec. 46 (1896); *id.* at 1423 (1897), and it was ultimately amended to cover wives and minor children. *Id.* at 2667 (1897).

[13] "Out of regard for marital and other close family ties, and the duties and obligations arising therefrom, as well as high moral considerations, the committee thought proper to make the other exceptions embraced in the bill." H.R. Rep. No. 851, 62d Cong., 2d Sess. 2 (1912).

[14] *See, e.g.*, 54 Cong. Rec. 2442–57 (1917); *id.* at 2465–63, 2620–29; 53 Cong. Rec. 4768–4816 (1916); *id.* at 4841–4885, 4932–4962, 5050–52.

[15] All aliens over sixteen years of age, physically capable of reading, who can not read the English language, or some other language or dialect, including Hebrew or Yiddish: *Provided,* (1) That any admissible alien, or any alien heretofore or hereafter legally admitted, or any citizen of the United States, may bring in or send for his father or grandfather over fifty-five years of age, his wife, his mother, his grandmother, or his unmarried or widowed daughter, if otherwise admissible, whether

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This law remained in force until 1952, when it was replaced by the present provision.[16] The 1952 Act was preceded by a three-year study commissioned by the Senate which recommended that the literacy provision be retained but that all exemptions for relatives be deleted. S. Rep. No. 1515, 81st Cong., 2d Sess. 375 (1950). Although the original House and Senate versions accepted this recommendation, H.R. Rep. No. 2096, 82d Cong., 2d Sess. 24 (1952), and an effort to introduce an amendment on the floor of the House was defeated, 98 Cong. Rec. 4432 (1952),[17] the final Senate version, which contained the exemptions, was accepted by the House and Senate conferees. H.R. Rep. No. 2096, *supra* at 128.[18] Minimal attention was paid to this provision because of its reduced importance as an exclusionary device.[19] The Senate report, however, refers to illiteracy as one of the "more important grounds" for exclusion, S. Rep. No. 1137, 82d Cong., 2d Sess. 8 (1952), and noted that the clause was being revised to require understanding of, as well as reading of, a language. *Id.* at 10. There is nothing to indicate that Congress meant its recodification to result in a more liberal interpretation of the section.

III. Discussion

Illiterate aliens are one of the groups "ineligible to receive visas," 8 U.S.C. § 1182(a).[20] The exception to this rule operates if the illiterate alien is "accompanying . . . [an] admissible alien." 8 U.S.C. § 1182(b). Even if we were to decide that admissibility is an issue wholly governed by § 1182 and not dependent on whether one is eligible for a quota visa under § 1153 (an issue we do not resolve), we do not believe that the State Department's argument that the child of an illiterate alien is "admissible" under § 1182 is correct. Under § 1182(a)(20), an alien is

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such relative can read or not; and such relative shall be permitted to enter. One of the few cases interpreting this provision emphasized that the principal alien had to be capable of "bring[ing] in" the parent, and rejected the claim that a 9-year-old girl could "bring in" her mother. *United States ex rel. Azizian* v. *Curran*, 12 F.2d 502, 503 (2d Cir. 1926).

[16] *See* nn. 1 & 2.

[17] *See also* 98 Cong. Rec. 4435–36 (1952) (statement of Rep. Powell).

[18] It is possible that the exemptions were reintroduced at the urging of the INS. Internal Justice Department memoranda commenting on the proposed bills criticized them because they "seem to create an anomalous situation. In § 203(a) (2), (3), and (4), preferences are created in the quota for parents, children, and certain other close relatives. These preferences will apparently avail them nothing if it should appear that they are illiterate. It is recommended that the attention of the Congress be invited to this situation so that, if desired, the bill can be changed to provide an exemption for close relatives, similar to that which exists in the present law." Memorandum for the Deputy Attorney General from the Commissioner of Immigration and Naturalization, December 7, 1951, (56190/113–A) (Part II), at 212–18. *See also* Memorandum for the Deputy Attorney General from the Commissioner of Immigration and Naturalization, January 16, 1951, (56190/113–A) (Part II), at 25. Both of these can be found in the main library of the Department of Justice, in vol. 1 of the bound legislative history of the 1952 Act.

[19] The December 7, 1951 memorandum discussed *supra* n.18 indicated that fewer than 2,000 illiterate aliens a year were then applying for admission.

[20] Although the State Department bases its argument in large part on the distinction between eligibility for a quota visa under § 1153 and admissibility under § 1182, Brathwaite Memorandum at 3–4, an illiterate alien is entitled to neither a visa nor admission under § 1182 unless he is exempted by § 1182(b).

inadmissible unless he is "in possession of a valid unexpired immigrant visa." *See also* 8 U.S.C. § 1181(a), § 1182(a)(21). The child cannot possess a valid immigrant visa until he confers eligibility upon his parent who thereupon becomes eligible for the quota visa, and thus obtains one for the child. The circularity of this reasoning can be avoided if the statute's intent is remembered. The § 1182(b) exception was intended as a humanitarian exception to permit immigrants to bring their close—but illiterate—family members to this country. It was not intended to permit illiterates to enter by bringing their children with them. It is difficult to imagine that Congresses uniformly hostile to the admission of illiterates intended to create an exception for illiterates with families.

Rather, the statute should be read to permit literate aliens to receive a quota visa and then to use the exception to bring in their illiterate children and close relatives. This comports with both of Congress' desires: to exclude illiterates and to provide a humanitarian exception minimizing disruption of a qualified alien's family.[21] We therefore conclude that the INS is correct in asserting that illiterates are not eligible to receive quota visas because they will be accompanied by a child who is under 16. We assume that the State Department will so advise its consular officers and will revise its regulations based on this understanding.

Larry L. Simms
Deputy Assistant Attorney General
Office of Legal Counsel

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[21] The State Department is no doubt correct when it asserts that this interpretation will bar most illiterates from receiving quota visas. State Memorandum, *supra* at 4. That, we believe, was Congress' intention.

United States Participation in Interpol Computerized Search File Project

Neither state nor federal law would prohibit participation by the United States National Central Bureau of Interpol (USNCB) in a proposed computerized information exchange system, provided the USNCB complies with all disclosure, accounting, and publication requirements imposed by applicable federal statutes, such as 22 U.S.C. § 263a, the Privacy Act, and other federal restrictions on the exchange of criminal history information. As a matter of comity, the USNCB may comply with relevant state laws and regulations that restrict the disclosure and dissemination of personally identifiable information; however, under the Supremacy Clause, as a federal law enforcement agency it is not bound to do so.

The requirements of the Privacy Act may affect the structure and functioning of any computerized information exchange system in which the USNCB participates, particularly insofar as it would require the USNCB to verify the accuracy of data in its records prior to disclosure.

Applicable international guidelines and agreements relating to information exchange and privacy protection are broader in scope than the Privacy Act, and may restrict federal law enforcement agencies' ability to participate fully in the proposed system. Moreover, there are a number of possible international conflicts of law issues raised by the United States' participation in Interpol generally, and in any automated information exchange system it may implement.

December 9, 1981

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION

This responds to your request for this Office's advice on legal issues implicated by the proposed Interpol Computerized Search File Project, Fisher Informatise de Recherches (F.I.R.). This project, if approved by the Interpol General Assembly, will result in computerization of information now maintained by the Interpol General Secretariat and the exchange of information among member national central bureaus (NCBs) and the General Secretariat. While our discussion focuses on the F.I.R. project, our analysis may, as you recognize in your request, have implications for other recent initiatives dealing with the computerized exchange of personally identifiable information. One such initiative would be the recommendation of the Attorney General's Task Force on Violent Crime for establishment of an Interstate Identification Index as an alternative to a national centralized computerized criminal history file. We will, as appropriate, point out that overlap and the possible effects of our analysis on the Interstate Identification Index proposal.

We understand that the primary purpose of the F.I.R. project is to facilitate more rapid exchange of information through Interpol; such exchanges are presently accomplished largely on a manual basis. Implementation of the F.I.R. project would not alter the obligations and responsibilities of member NCBs with respect to the exchange of information, except insofar as will be necessary for technical operation of the system. Therefore, we do not believe that the computerization of the General Secretariat's files and the exchange of information among members of Interpol raise any unique legal issues. The more difficult questions will undoubtedly be those of policy and technical feasibility. You have also asked us to address more generally, however, the legal issues raised with respect to the collection and exchange of information among the member NCBs and the General Secretariat, so that you may evaluate how they affect the usefulness, desirability, and design of the F.I.R. project. We focus in this memorandum on the following: (1) restrictions imposed by state or federal law on the information that the United States National Central Bureau (USNCB) may contribute to the F.I.R. system; (2) the USNCB's responsibility to verify data it discloses through the system; and (3) the effect on federal law enforcement agencies of the voluntary privacy protection guidelines recently adopted by the Organization for Economic Cooperation and Development and of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data adopted by the Council of Europe. We will also discuss briefly conflict of laws problems raised by the F.I.R. project.

I. Background

Currently, NCBs exchange criminal justice and certain humanitarian information directly with the General Secretariat, which maintains a centralized file in St. Cloud, France, and directly with other NCBs. Under the F.I.R. project, the centralized records now maintained by the General Secretariat in manual form, which consist primarily of information contributed by member NCBs, would be put in a computerized data base accessible by member NCBs through remote terminals. This would be similar in design to the Computerized Criminal History File (CCH) now maintained as part of the Federal Bureau of Investigation's (FBI's) National Crime Information Center (NCIC). Channels would also be created between member NCBs allowing direct communication of requests and information without intermediate processing at the Interpol General Secretariat. It is our understanding that the FBI's NCIC system does not permit direct communication between state and local governments, but that such communication may be accomplished independently through the National Law Enforcement Telecommunications System (NLETS).

An alternative system design would be a central index maintained by the General Secretariat which would include only names or other identifying characteristics and corresponding index entries indicating which NCB maintains relevant information. A requesting NCB could not obtain information directly from the General Secretariat under such a system, but would be referred to the NCB that has information responsive to the request. The FBI's proposed Interstate Identification Index, which has been undergoing a trial in Florida, is based on the index concept.

We understand that the F.I.R. project has as yet only been proposed in principle, and that it will be submitted to the Interpol General Assembly early in 1982 for approval. Assuming the project is approved, the details of its design and operation will be addressed by the General Assembly only after the project has been approved in concept.[1]

II. Restrictions on Exchanges of Information

You have asked us to address specifically whether state or federal laws impose binding restrictions on the types of information the USNCB can contribute to the F.I.R. system. The USNCB now exchanges a wide variety of information with other NCBs and the Interpol General Secretariat, including: humanitarian records (missing persons, amnesia victims, victim locate requests, and identification of decedents); criminal subject records (stolen property, wanted persons, criminal history records); criminal investigative records (persons involved in or property associated with a criminal act); and criminal intelligence records (information indicating that a specific individual may commit a specific criminal act). Upon occasion, other types of personal assistance data may be communicated through Interpol to facilitate humanitarian efforts.[2] As we discuss below, we do not believe that state or federal law would prohibit the USNCB from continuing to exchange those categories of information through Interpol, provided the USNCB complies with all disclosure, accounting, and publication requirements imposed by the applicable federal statutes.

A. Restrictions Imposed by State Laws

A significant portion of information communicated by the USNCB through Interpol comes from cooperating state and local law enforcement agencies, either directly through the NLETS system or indirectly through other federal law enforcement systems such as the Treasury Enforcement Communications Systems (TECS).[3] Most, if not all, states have laws restricting secondary dissemination of particular types of information, ranging from omnibus privacy legislation modeled on the federal Privacy Act, to specific limitations on disclosure of tax, welfare, criminal history, or other personal information.[4] The first question you have posed is whether the USNCB must or should comply with state laws that restrict the disclosure of personal history information, either (1) on the principle that the records submitted by a state remain the property of the state and therefore subject to state statutory restrictions; or (2) on a principle of voluntary compliance based on federal/state comity.

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[1] Rules governing the processing of police information within Interpol, including treatment of data in an automated data processing system, have recently been discussed by the General Assembly. In our memorandum of October 17, 1981, we commented on the acceptability of those rules under United States law. We understand that because many countries did not have an adequate opportunity to review those rules before the General Assembly meeting, a committee has been established to consider the draft further, and that the rules, as modified, will be resubmitted to the General Assembly next year.

[2] For example, information relating to adoptions of Peruvian babies is communicated between Peruvian authorities and the adopting parents only through Interpol channels.

Many federal law enforcement agencies, including the FBI and the USNCB, recognize that the primary responsibility lies with state and local law enforcement agencies for determining what information can or should be disclosed to federal agencies. Neither the FBI nor the USNCB requires state and local agencies to disclose any information, or particular types of information. Disclosure is on a voluntary, cooperative basis. In some instances, if the state or local agency undertakes to exchange information, it becomes subject to federal restrictions on maintenance and disclosure of that information, but those restrictions do not affect the state's authority to decide, in the first instance, whether it will transmit particular types of information to the federal agency and whether such transmittal would comply with state law.[5] Both the FBI and the USNCB routinely honor requests by state and local law enforcement agencies for return, deletion, or modification of records previously forwarded to the federal agency. Thus, the FBI and USNCB recognize that states have a legitimate interest in and considerable control over what criminal justice information will be exchanged.

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[3] The USNCB has direct access to TECS, which includes data bases of a number of Treasury and other federal agencies, including the U.S. Customs Service, the Bureau of Alcohol, Tobacco and Firearms, the Internal Revenue Service, and, to a limited extent, the United States Coast Guard and the Department of State. Through TECS, the USNCB also has access to the FBI's criminal record information files.

[4] Although we have not undertaken an exhaustive survey of state laws that regulate the disclosure of personal information, several state statutes we have reviewed apply only to disclosure of information by state agencies and officials, and therefore would not restrict disclosure by federal agencies or officials. For example, the Minnesota statute referred to in your request, which prohibits disclosure to "the private international organization known as Interpol," applies only to state agencies and political subdivisions. Minn. Stat. Ann. § 15.1643 (West Supp. 1980). *See also Ark.* Stat. Ann. §§ 16-801 to 810 (1979) (omnibus privacy act applicable to "an agency of the State Government or any local government or other political subdivision of the State"); Conn. Gen. Stat. Ann. §§ 4-190 to 197 (West Supp. 1980) (restrictions on transfer of "personal data" by any "state board, commission, department, or officer"); *but see* Me. Rev. Stat. Ann. tit. 16, §§ 611-22 (West Supp. 1979-80) (limiting use of criminal justice information by "criminal justice agencies," including "federal, state . . . or local government agenc[ies]").

[5] For example, the regulations governing disclosure of criminal justice information by state agencies that receive Law Enforcement Assistance Administration funding under the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. §§ 3701-3797 (Supp. IV 1980), provide that, "Subsection (b) [limiting dissemination of criminal justice information by states] does not mandate dissemination of criminal history record information to any agency or individual. States and local governments will determine the purposes for which dissemination of criminal history record information is authorized by state law, executive order, local ordinance, court rule, decision or order." 28 C.F.R. § 20.21(c)(3), interpreting 42 U.S.C. § 3789g(b).

We believe that this recognition of the states' interest in criminal justice information communicated to federal agencies is only a matter of comity between state and federal law enforcement agencies. While federal agencies may choose to honor states' requests or statutory restrictions in the exchange of information, they are not bound by state laws that restrict secondary dissemination of criminal justice information. Under the Supremacy Clause of the Constitution, Art. VI, cl. 2, it is settled that the states cannot subject instrumentalities of the federal government to state regulation or control, in the absence of a clear congressional mandate to make federal authority subject to state regulation.[6] In particular, courts have held that state statutes restricting disclosure of certain types of information must give way where they are inconsistent with an Act of Congress or the Constitution, as, for example, where a federal grand jury subpoenas records otherwise protected by state statute.[7] Where the agency is not subject to state statutes or regulations restricting the disclosure of information, *a fortiori* its officers and employees are not subject to prosecution for violation of those regulations, if they are acting in furtherance of their responsibilities under federal law.[8]

Here, the relevant statutes that affect the ability of federal agencies to collect and disseminate data contain no "clear congressional mandate" that the federal agencies and their employees are subject to the restrictions contained in the various state statutes on use of criminal justice information except as a matter of comity. *See, e.g.,* 28 U.S.C. § 534 (authorizing the Attorney General to "acquire, collect, classify and preserve identification, criminal identification, crime and other records" and to "exchange these records with and for the official use of authorized officials of the Federal Government, the States, cities and penal and other institutions"); Omnibus Crime Control and Safe Streets Act of 1968, *supra*; 22 U.S.C. § 263a (authorizing the Attorney General to "accept and maintain membership . . . in Interpol").

You suggest in your request that language in *Tarlton* v. *Saxbe,* 507 F.2d 1116 (D.C. Cir. 1974) and Department of Justice regulations governing the disclosure of criminal history information under the Omnibus Crime Control and Safe Streets Act, *supra*, might embody a concept of "data ownership" whereby information contributed by a state to a federal agency would remain the property of, and therefore under the control of, the contributing state. We do not believe that such a concept is inherent in either the *Tarlton* decision or the pertinent regulations. In *Tarlton*, an action for expungement of FBI arrest records, the Court of Appeals for the District of Columbia Circuit suggested that 28 U.S.C. § 534, *supra*, may require the FBI to make "reasonable efforts" to maintain "constitutionally accurate criminal files." It bolstered that suggestion by reference to § 524(b) of the Omnibus Crime Control and Safe Streets Act, which requires state officials subject to the Act to make efforts to assure the accuracy and completeness of criminal history record information submitted to the FBI. The court noted in a footnote that:

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[6] *See Mayo* v. *United States,* 319 U.S. 441, 447–48 (1943); *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, 122 (1954).

[7] *In re Grand Jury Subpoena, May 1978, at Baltimore,* 596 F.2d 630, 632 (4th Cir. 1979); *In re Special April 1977 Grand Jury,* 581 F.2d 589, 592 (7th Cir.) *cert. denied sub. nom. Scott* v. *United States* 439, U.S. 1046 (1978); *see In re Grand Jury Subpoena for N.Y. State Income Tax Records,* 468 F. Supp. 575, 577 (N.D.N.Y. 1979); *see also United States* v. *Thorne,* 467 F. Supp. 938, 940 (D. Conn. 1979).

[8] *See In re Neagle,* 135 U.S. 1, 62 (1890); *Ohio* v. *Thomas,* 173 U.S. 276, 282 (1899); *Massachusetts* v. *Hills,* 437 F. Supp. 351, 353 (D. Mass. 1977) (Secretary of HUD not subject to criminal prosecution for alleged violations of Massachusetts Sanitary Code in buildings owned by department); Memorandum for the Attorney General from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel (Nov. 30, 1976); *see generally United States* v. *Georgia Public Service Comm'n,* 371 U.S. 285, 292–93 (1963).

> Congress surely cannot be presumed to undercut its action in [28 U.S.C.] § 534 by intending that the FBI be authorized to receive and disseminate without reasonable precautions the sort of incomplete, unchallengable information from state or local officials which those officials themselves are forbidden to disseminate.

507 F.2d at 1125 n.28. The court's reference to "the sort of . . . information from state or local officials which the officials themselves are forbidden to disseminate," involves only the obligations imposed on state officials under the Omnibus Act, and not those obligations imposed under state laws. This language therefore does not suggest that the FBI (or any other federal agency) is bound by state laws restricting the disclosure of criminal history information. Likewise, 28 C.F.R. § 20.21(c), quoted at n.5 *supra*, recognizes only that a state is not required to disclose information if disclosure would contravene its own law, regulations, or orders. That subsection does not suggest that the FBI is bound by such state laws.

Moreover, the concept of "data ownership" would imply that the receiving agency does not have control over data that it did not develop itself, and therefore that the receiving agency is not bound by federal laws or regulations governing use and disclosure of that information, such as the Privacy Act or the Freedom of Information Act (FOIA). There is no suggestion, however, in either the Privacy Act or FOIA that records collected by a federal agency are exempt from the requirements of those statutes if they are contributed by a state agency.[9]

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[9] The Privacy Act applies broadly to any "system of records" maintained, collected, used, or disseminated by a federal agency. "Record" is defined in terms of the nature of the information (*i.e.*, information about an individual) and not the source of the information. 5 U.S.C. § 552a(a)(4). The definition of "system of records" is intended to exclude only groupings of records over which the

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Finally, because federal agencies collect information from thousands of sources, including an estimated 20,000 state and local law enforcement agencies, it would clearly be impracticable to require the federal agencies to abide by the varying and inconsistent restrictions imposed by individual state laws. Where state regulation will frustrate the purpose and operation of a duly authorized federal program, the state statute must give way. *See Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 540–44 (1958); *Mayo* v. *United States*, 319 U.S. at 445; *City of Los Angeles* v. *United States*, 355 F. Supp. 461, 465 (C.D. Calif. 1972).

Thus, we conclude that federal agencies such as the USNCB or the FBI may, as a matter of comity, comply with state restrictions on the use of data or state requests with respect to disclosure of data, at least so long as those restrictions are not themselves inconsistent with federal law, but are not obligated to abide by the laws of the various states in the handling of data submitted by the states. In addition, federal agencies are not required to comply with restrictions on disclosure of data imposed by the domestic laws of foreign countries, but may choose to honor those restrictions as a matter of international comity.[10]

B. Restrictions Imposed by Federal Law

While the USNCB need not comply with limitations imposed by state law except as a matter of comity, there are federal statutes and

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agency has no "control"—*i.e.*, if it does not have access to the records; the ability to include, exclude, or modify information included in the grouping; or the responsibility to ensure the physical safety and integrity of the records—and records which, although in the physical possession of agency employees and used by them in performing official functions, are not "agency" records, such as uncirculated personal notes, papers, and records retained or discarded at the author's discretion and over which the agency exercises no control or dominion. *See* Office of Management and Budget Privacy Act Guidelines. 40 Fed. Reg. 28,949, 28,952, (July 9, 1975) (OMB Guidelines). The FOIA applies generally to "records" of an agency, except as specifically exempted by the statute. 5 U.S.C. § 552(a)(3)(b). With the exception of the exemption in FOIA for "trade secrets and commercial or financial information obtained from a person and privileged or confidential," we are unaware of any statutory or regulatory provision or administrative or judicial interpretations suggesting that the Privacy Act and FOIA do not apply to records maintained by agencies on the sole ground that the records were obtained from a source outside the agency.

[10] For example, the federal agency could agree, by contract or otherwise, to restrict dissemination of state-supplied data and to honor states' requests for modification or return of information, so long as that agreement is not inconsistent with the agency's obligations under federal statutes. As we discuss *infra*, however, such agreement would not in any sense exempt information contributed by the states from the Privacy Act, FOIA, or other federal disclosure statutes, once that information has been incorporated in the records of the federal agency. An index system, either at the federal or international level, would clearly have advantages in enabling the responsible central authority to honor restrictions requested by the states or foreign governments, because the central authority would not retain or disclose the information itself, but would only refer the requesting entity to the state or country that has relevant information. It would be the responsibility of that state or government to determine if disclosure is consisent with its laws, regulations, and policies. Even with a centralized data base, however, it may be possible to accommodate differing state or national disclosure requirements by allowing the source of the information unilaterally to restrict or qualify subsequent uses of information disclosed to the authority. The Interpol draft rules, for example (*see* n.1 *supra*), contemplate that an NCB may classify information as intended only for the use of the General Secretariat (Art. 6, ¶ 3) or only for the use of the country to which the information is communicated (Art. 12, ¶ 3). As a technical matter, codes or safeguards would have to be built into the F.I.R. project to accommodate such limitations.

regulations that restrict the types of data that can be collected and disseminated by the USNCB and the circumstances under which information can be disclosed outside the agency. In particular, we consider here: (1) 22 U.S.C. § 263a (Supp. IV 1980), the legislation authorizing United States participation in Interpol; (2) the Privacy Act; and (3) other federal restrictions on the exchange of criminal history information.

1. 22 U.S.C. § 263a

The statutory authority for participation by the United States in Interpol is 22 U.S.C. § 263a, which authorizes the Attorney General "to accept and maintain, on behalf of the United States, membership in the International Criminal Police Organization, and to designate any departments and agencies which may participate in the United States representation with that organization." Participation by the United States in Interpol is accomplished through the USNCB, which is part of the Department of Justice.[11] No statutory or regulatory authority expressly authorizes the USNCB to exchange criminal justice or humanitarian information through Interpol.[12] Such authority can be inferred, however, from the broad mandate in § 263a authorizing participation in the organization, and congressional approval of payment of dues to Interpol. *See, e.g., Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116 (1947).[13]

We believe that the USNCB has broad authority to coordinate and communicate criminal investigative requests and humanitarian requests with the United States law enforcement agencies, the Interpol Secretariat, and other NCBs, consistent with the purposes of Interpol. The Interpol constitution describes the purposes of Interpol as follows:

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[11] The Attorney General has approved a departmental reorganization that will make the USNCB a separate office within the Department of Justice. *See* memorandum from William French Smith, Attorney General, to Rudolph W. Giuliani, Associate Attorney General (Oct. 14, 1981).

[12] As part of the departmental reorganization (*see* n.10 *supra*), the Attorney General has also proposed an amendment to the Department of Justice's organizational regulations, which will specify the functions to be handled by the USNCB. Those functions include the authority to "transmit information of a criminal justice, humanitarian, or other law enforcement related nature between National Central Bureaus of INTERPOL member countries, and law enforcement agencies within the United States and abroad; and respond to requests by law enforcement agencies and other legitimate requests by appropriate organizations, institutions and individuals, when in agreement with the INTERPOL Constitution."

[13] Prior to 1978, § 263a included a ceiling on the amount of dues the United States could contribute to Interpol. Between 1957 and 1978, Congress raised that ceiling several times. *See, e.g.*, Pub. L. No. 85–768, 72 Stat. 921; Pub. L. No. 90–159, 81 Stat. 517; Pub. L. No. 92–380, § 1, 86 Stat. 531; Pub. L. No. 93–468, § 1, 88 Stat. 1422. In reports accompanying bills to increase the dues ceiling, Congress described in some detail the information-gathering functions of Interpol, and acknowledged that the United States' participation in Interpol is of substantial value for efforts to combat crime on an international scale. *See, e.g.*, S. Rep. No. 2403, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Ad. News 3957; S. Rep. No. 1199, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5906. In 1978, Congress amended § 263a to provide that dues and expenses for the membership of the United States in Interpol "shall be paid out of sums authorized and appropriated for the Department of Justice." Pub. L. No. 95–624, § 21(a), 92 Stat. 3466.

> a) To ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the "Universal Declaration of Human Rights."
>
> b) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.

Art. I. This specification of purpose is quite broad, and can be read to encompass the types of criminal justice and humanitarian information now collected and exchanged by the USNCB.[14]

2. Privacy Act, 5 U.S.C. § 552a

The USNCB must comply with the requirements of the Privacy Act with respect to any personal information maintained on United States citizens or permanent residents.[15] The Privacy Act limits the collection and dissemination of "personally identifiable" information by federal agencies generally to "such information . . . as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. § 552a(e)(1). The Act specifically prohibits the maintenance of any records "describing how any individual exercises rights guaranteed by the First Amendment." 5 U.S.C. § 552(e)(7). Criminal history information and certain law enforcement records, however, may be exempted from the requirements of subsections (e)(1) and (e)(7). 5 U.S.C. § 552a(j)(2). Pursuant to that authority, law enforcement records maintained by the USNCB in its Criminal Investigative Records System have been exempted from those requirements. The exemption from subsection (e)(1) means only, however, that the USNCB need not screen all information received from state, local, or foreign sources to determine if the information is relevant and necessary to the USNCB's statutory purpose. As we discuss below, the USNCB is required to make reasonable efforts prior to dissemination of any information subject to the Privacy Act to assure that the records disseminated are "relevant" to the USNCB's purposes. *See* 5 U.S.C. § 552a(e)(6). Moreover, independent of the requirements of the Privacy Act, the USNCB is without statutory authority to collect or disseminate information that is unrelated to the purposes of Interpol. *See* discussion in previous section.

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[14] The authority of Interpol to investigate crimes is generally limited to "ordinary law crimes." Article III of the Interpol constitution expressly forbids the organization "to undertake any intervention or activities of a political, military, religious or racial character." We understand that because of this express limitation in the Interpol constitution, the USNCB will not provide through Interpol information related to incidents of a "political, military, religious or racial" character. In addition, the draft rules on processing of police information recently considered by the Interpol General Assembly (*see* n.1 *supra*) would restrict the disclosure of information by the General Secretariat and the NCBs, although the rules do not restrict the prerogative of individual NCBs to determine what types of information can or should be disclosed under their own laws and policies. Under those rules, "police information" may be disclosed only for the following purposes:

> . . . to prevent ordinary law crimes, to bring the persons responsible to justice, to find the victims of such crimes, to find missing persons and to identify dead bodies . . . Items of police information other than names of persons may be processed for research and publication purposes. Any police information that has been published may also be processed for general reference purposes.

Art. 3, ¶¶ 3, 4. Items of police information may be further disseminated by the receiving NCB only to "official institutions concerned with the enforcement of the criminal law in its country." Art. 12, ¶(4).

[15] The Privacy Act does not apply to information maintained on foreign nationals unless they have permanent resident status in the United States. Thus, information that the USNCB maintains on foreign nationals and nonresident aliens is not subject to the disclosure, accounting, and access requirements of the Act.

Other than the limitations imposed by subsections (e)(1) and (e)(7), which may be of limited practical significance because of the exemption of law enforcement records, the Privacy Act does not limit the *types* of personal information that may be maintained and disseminated by a federal agency. The Privacy Act does, however, limit the *circumstances* under which such information may be disclosed. No personal information subject to the Act may be disclosed without the consent of the individual concerned unless one of eleven statutory exceptions is met. 5 U.S.C. § 552a(b). For law enforcement purposes, the most significant exception allowed is for a "routine use" of the agency, *i.e.*, a use which is "compatible with the purpose for which [the record] is collected." 5 U.S.C. § 552a(a)(5), (b)(3).

The legislative history of the Privacy Act does not provide much guidance as to the outer limits of the "routine use" exception. Congress chose not to define or prescribe a list of permissible "routine uses." Instead it provided a check on the scope of the exception by requiring publication of the nature of all "routine uses" in the Federal Register. Rep. Moorhead noted in House debate on the bill that:

> It would be an impossible legislative task to attempt to set forth all of the appropriate uses of Federal records about an identifiable individual. It is not the purpose of the bill to restrict such ordinary uses of the information. Rather than attempting to specify each proper use of such records, the bill gives each Federal agency the authority to set forth the "routine" purposes for which the records are to be used under the guidance contained in the committee's reports.
>
> In this sense "routine use" does not encompass merely the common and ordinary uses to which records are put, but also includes all of the proper and necessary uses even if any such use occurs infrequently . . . .
>
> Mr. Chairman, the bill obviously is not intended to prohibit . . . necessary exchanges of information, provided its rulemaking procedures are followed. It is in-

> tended to prohibit gratuitous, ad hoc, disseminations for private or otherwise irregular purposes. . . .

See 120 Cong. Rec. 36,967 (1974) (remarks of Rep. Moorhead); *see also* OMB Guidelines, 40 Fed. Reg. at 28,952. We are unaware of any judicial decisions that define the outer limits of the "routine use" exception. In the absence of definitive legislative history or court rulings to the contrary, we believe that the "routine use" exception affords considerable latitude to a federal agency to disclose information in furtherance of the purposes of that agency.

The USNCB, as well as other federal law enforcement agencies, have interpreted the "routine use" exception to authorize disclosure of criminal history, investigative, and intelligence records for a wide variety of law enforcement and humanitarian purposes. *See* 45 Fed. Reg. 75,902–03 (Nov. 17, 1980) (disclosure of routine uses of Interpol Criminal Investigative Records System). The USNCB has made the disclosures required by the Privacy Act. *See* 45 Fed. Reg. 16,473 (March 12, 1981); 45 Fed. Reg. 75,903 (Nov. 17, 1980). We have reviewed the routine uses listed by the USNCB, and believe they are consistent with the scope of the Privacy Act "routine use" exemption. If the F.I.R. project is implemented, however, the USNCB should consider at that point whether additional disclosures are necessary to describe the relationship between the F.I.R. system and the USNCB's system of records, and the exchange of information that will be made through the F.I.R. system.

The requirements of the Privacy Act may also affect how the F.I.R. system should be structured. For example, under subsections (c)(1) and (2), 5 U.S.C. § 552a(c)(1) and (2), the USNCB is required to keep an accurate accounting of the date, nature, and purpose of each disclosure of information subject to the Act, and the name and address of the person or agency to whom the disclosure is made. If disclosures are made directly through the F.I.R. system, the system must provide a mechanism for the USNCB to keep the required accounting. In addition, the USNCB must be able to ensure the "security and confidentiality" of records in its system by "appropriate administrative, technical and physical safeguards." 5 U.S.C. 552a § (e)(10). The system should allow the USNCB to screen incoming requests from other NCBs or from the General Secretariat and to verify that the disclosure of requested information would be consistent with the "routine uses" authorized for that information and with the Interpol constitution.[16] As we discuss below, the USNCB must also be able to screen outgoing information.

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[16] The USNCB currently screens all requests from other NCBs for criminal history information to determine that: (1) a crime has been committed in the country requesting the information, and the crime would be considered a violation of U.S. law; (2) there is a link between the crime and the individual about whom the information is requested; and (3) the type of crime is not one encompassed by Article III of the Interpol constitution.

C. Criminal History Record Exchange Restrictions

When the USNCB obtains information from the FBI's Computerized Criminal History File or Identification Division systems, it is restricted in the use of that information by regulations promulgated under the Omnibus Crime Control and Safe Streets Act of 1968, *supra. See* 28 C.F.R. Part 20, Subpart C.[17] Subsection 20.33 provides that data from those systems will be made available by the FBI to, *inter alia,* "criminal justice agencies for criminal justice purposes" and to "federal agencies authorized to receive it pursuant to Federal statute or Executive Order." 28 C.F.R. § 20.33(a)(1) and (2). That exchange, however, is "subject to cancellation if dissemination [of the information] is made outside the receiving departments or related agencies." *Id.* § 20.33(b). We believe that disclosure of information from the FBI's NCIC or Identification Division files to Interpol and other NCBs is authorized by this provision, on the ground that the disclosure is to a "related agency." We note in that regard that the purpose of the FBI's exchange of information with the USNCB is to facilitate similar exchanges with constituents of Interpol, and that the FBI would be authorized under these regulations to disclose such information directly to "criminal justice agencies" in foreign countries, such as NCBs or the Interpol General Secretariat. Under § 20.33(b), however, if the USNCB discloses information obtained from the FBI's CCH or Identification Division files to foreign agencies not affiliated with Interpol or to private businesses, financial organizations, or individuals, its privilege of access to those files would be subject to cancellation.

III. The USNCB's Obligation to Verify Records

A separate question arising under the Privacy Act is the extent to which the USNCB must verify data disclosed to other NCBs, the Interpol General Secretariat, and state and local law enforcement agencies in the United States. Under the Privacy Act, prior to dissemination of any record about a United States citizen or permanent resident alien to anyone other than another federal agency, the USNCB is required to make "reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes." 5 U.S.C. § 552a(e)(6).[18]

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[17] This subpart applies to "federal, state and local criminal justice agencies to the extent that they utilize the services of Department of Justice criminal history record information systems." 28 C.F.R. § 20.30. "Department of Justice criminal history record information system" is defined to include only the Identification Division and Computerized Criminal History File Systems operated by the FBI. 28 C.F.R. § 20.3(j).

[18] The Privacy Act authorizes exemption of law enforcement files such as the USNCB's Criminal Investigative System from most of the requirements of § 552a(e) relating to the quality of records collected and maintained by the agency. *See* 5 U.S.C. § 552a(j)(2). No exemption is authorized, however, from the requirements imposed by § 552a(e)(6). *Id.*

This provision does not require the USNCB to guarantee the accuracy, completeness, timeliness, and relevance of records disclosed, but only to make efforts that are reasonable given the administrative resources of the agency, the risk that erroneous information will be disseminated, and the possible consequences to an individual if erroneous information is disclosed. *See* OMB Guidelines, 40 Fed. Reg. at 28,953; *Smiertka* v. *United States Dep't of Treasury,* 447 F. Supp. 221, 225–26 & n.35 (D.D.C. 1978). Courts have noted in varying contexts that reasonable efforts may include, at a minimum, modification or deletion of information if the source of that information informs the agency that the information is incorrect or incomplete;[19] a request for additional factual information from the source if an individual submits evidence challenging the accurracy of information contained in the agency's files; [20] or modification or deletion of records if the agency's independent investigation and evaluation overwhelmingly shows that the information is incorrect or unfounded.[21] The OMB Guidelines suggest that, because the disclosing agency is often not in a position to evaluate "acceptable tolerances of error for the purposes of the recipient of the information," it may be appropriate for the agency "to advise recipients that the information disclosed was accurate as of a specific date . . . or of other known limits on its accuracy *e.g.,* its source." 40 Fed. Reg. 28,949, 28,965 (July 9, 1975).

Since implementation of the F.I.R. project may substantially increase the volume of requests and disclosures handled by the USNCB, it will be particularly important to establish workable procedures and guidelines to implement the USNCB's obligation under § 552a(e)(6). We cannot outline here what "reasonable efforts" would be for the USNCB, as that would require a detailed knowledge of how information is collected, stored, retrieved, and disclosed.[22] We note, however, that the F.I.R. system must provide an adequate opportunity for the USNCB to screen all data prior to their dissemination outside the federal government and to supplement information disclosed, as appropriate, with caveats about its source, timeliness, or reliability.

IV. International Initiatives

You have asked us specifically to address the potential impact on federal law enforcement systems of the OECD's Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data

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[19] *See Menard* v. *Saxbe,* 498 F.2d 1017, 1027–28 (D.C. Cir. 1974).

[20] *See id.; Tarlton* v. *Saxbe,* 507 F.2d 1116, 1129 (D.C. Cir. 1974).

[21] *See Murphy* v. *National Security Agency,* C.A. No. 79–1833 (D.D.C. Sept. 29, 1981), memorandum op. at 9; *R.R.* v. *Dep't of Army,* 482 F. Supp. 770, 773 (D.D.C. 1980).

[22] This analysis would be more appropriate, for example, for the Interpol Policy Guidelines Working Group, which will be responsible for reviewing and updating policies applicable to the USNCB's day-to-day operations.

(OECD Guidelines)[23] and the Council of Europe's Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data (Council of Europe Convention),[24] and any international conflict of laws issues associated with United States participation in Interpol and the Interpol F.I.R. project. Both the OECD Guidelines and the Council of Europe Convention attempt to balance the need for protection of personal privacy arising out of increasing flows of personal information across national borders, and the political and economic necessity of maintaining transborder flows of data with minimal restrictions. The OECD adopted the approach of voluntary guidelines, based on certain "basic principles" of national application intended to provide minimum privacy protection,[25] and of international application, intended to encourage the free flow of data.[26] Member countries are encouraged to establish, through legislation, self-regulation, or voluntary efforts, legal, administrative, and other procedures or institutions for the protection of privacy, and to cooperate with other member countries to facilitate international exchanges of information. *See* Parts 4, 5. We understand that the United States participated in drafting the OECD Guidelines, and has undertaken to abide by the principles therein.

The Council of Europe Convention requires each Party[27] to "take the necessary measures in its domestic law to give effect to the basic principles for data protection" set out in the Convention. Chap. II, ¶ 1. Those principles resemble in content the principles outlined in the OECD Guidelines, with the addition of a specific provision that personal data that would reveal "racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life" or "personal data relating to criminal convictions" may not be processed automatically "unless domestic law provides appropriate safeguards." Art. 6. Parties are obligated to provide mutual assistance to notify other parties of steps taken to implement the Convention, and to assist persons resident abroad to exercise rights conferred under the domestic laws that give effect to the principles set out in the Convention. Arts. 13, 14.

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[23] The OECD is an intergovernmental organization dedicated to problems of economic development, whose members include the 19 democratic countries of Europe, the United States, Japan, Australia, New Zealand, and Yugoslavia (special associate status).

[24] The Council of Europe is an intergovernmental organization of 21 European countries. Its members are pledged to cooperate at intergovernmental and interparliamentary levels to promote greater European unity. *See* Hondius, *Data Law in Europe*, 16 Stan. J. of Int'l L. 87, 91 (1980). The United States is not a member of the Council of Europe.

[25] These principles encompass limits to collection of personal data; accuracy, completeness, relevance, and timeliness of data; specification of uses of data and limitation to those uses; security safeguards; openness in the establishment of systems and method of access to data; individual participation and access; and accountability. Part 2.

[26] Member countries are to take into consideration the implications for other member countries of domestic processing and re-export of personal data; to take reasonable and appropriate steps to ensure that transborder flows of personal data are uninterrupted and secure; to refrain from restricting transborder flows of personal data except where necessary; and to avoid developing laws, policies, and practices in the name of the protection of privacy and individual liberties, which would create obstacles to transborder flows of personal data that would exceed requirements for such protection. Part 3.

[27] No member of the Council of Europe has yet ratified the Convention. The Convention will not become effective until ratified by five members. Art. 22. Non-member states may be invited to accede to the Convention following its entry into force. Art. 23.

We note first that neither the OECD Guidelines nor the Council of Europe Convention imposes any binding obligations on the United States or on federal law enforcement agencies. The OECD Guidelines are voluntary. Parts 4 and 5 of the Guidelines discuss various methods for implementing the letter and spirit of the principles set forth through appropriate domestic legislation and policies and international cooperation, but do not impose any obligation upon parties other than mutual cooperation. The Council of Europe may, after the entry into force of the Convention, invite non-members to accede to the Convention. We are unaware whether the United States will be invited to accede, and whether the United States would accept that invitation. Since accession would obligate the United States to pass domestic legislation considerably broader in scope than that now in effect (*see infra*), it seems unlikely that the United States would accede to the Convention if invited, and we assume here that the United States will not accede to the Convention. Thus, the impact on federal law enforcement agencies will not stem from obligations imposed on the United States under either the OECD Guidelines or the Council of Europe Convention, but rather will most likely result from actions taken by other nations to implement the letter or spririt of those agreements.

In particular, both the OECD Guidelines and the Council of Europe Convention recognize the principle that a nation may restrict data flows to another nation if that nation does not afford the same protection to that data as is afforded by the originating state, or if the export of that data would circumvent the domestic privacy legislation of the originating country.[28] In that regard, the privacy protection contemplated by the OECD Guidelines and the Council of Europe Convention is broader than that afforded by the Privacy Act. The Guidelines and the Convention apply to all exchanges of information, private and public.[29] The Privacy Act, by contrast, leaves untouched information-gathering and disclosure by state and local governments and by private businesses or individuals.[30] Thus, even if the Privacy Act embodies most of the substantive requirements outlined in the OECD Guidelines and the Council of Europe Convention,[31] the coverage afforded by the

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[28] *See, e.g.*, OECD Guidelines, Part 3, ¶ 17; Council of Europe Convention Arts. 3, 6, 12 (¶ 3(a)).

[29] The Council of Europe Convention, however, applies only to information transmitted through automatic data processing. Arts. 1, 2, 3.

[30] There are federal statutes that restrict the use and disclosure of information by state and local governments and private parties, but only in limited sectors. *See, e.g.*, Fair Credit Reporting Act, 15 U.S.C. § 1681; Right to Financial Privacy Act of 1978, Pub. L. No. 95–630, 92 Stat. 3697 (codified at scattered sections in 31 U.S.C.).

[31] The "basic principles" of data protection listed in Part 2 of the OECD Guidelines parallel in most respects the underlying principles of the Privacy Act. *See* n. 25 *supra*.

Privacy Act is narrower than that of those agreements. The practical result of this may be that nations adhering to one or both of those agreements may refuse to disclose information to federal law enforcement agencies within the United States, such as the USNCB, because the United States does not provide protection for personal data that is equivalent to that provided by the originating country.[32] Under the OECD Guidelines, United States agencies could similarly refuse to disclose data if the requesting country could not adequately protect the security or use of that information.

Of course, even without the express recognition of this principle contained in the OECD Guidelines and the Council of Europe Convention, individual NCBs are free to restrict data flows for any reason, including the lack of privacy legislation in the receiving country. The express recognition of that prerogative in the OECD Guidelines and the Council of Europe Convention has highlighted the problem of protecting transborder data flows while ensuring personal privacy, however, and we cannot predict what the practical impact will be on federal law enforcement. This is clearly an area in which mutual cooperation and voluntary compliance with privacy protection guidelines could alleviate future problems.

It would be premature for us at this point to comment other than generally on the possible international conflicts of law issues raised by U.S. participation in Interpol and in the F.I.R. system. We note first that Interpol, as an organization, occupies a somewhat anomalous position under our law, as it was not established by treaty or protocol, and is not generally accorded status as an international organization.[33] While our participation is authorized by statute, the Interpol constitution has never been expressly approved by Congress or the Executive Branch and does not have treaty status. Consequently, the Interpol constitution and resolutions and rules adopted by the Interpol General Assembly do not have the force of law in the United States and do not confer any rights on United States citizens or residents that are enforceable in our courts. *See* U.S. Const., Art. VI, cl. 2; *see generally, Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *Bell* v. *Clark*, 427 F.2d 200 (4th Cir. 1971). Where there is a conflict between the USNCB's obligations under the Interpol constitution or rules and its obligations under U.S. law, the latter will prevail.

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[32] Federal, state, and local governments and private parties are not, of course, precluded from voluntarily supplementing the protections required by applicable domestic legislation, in an effort to avoid this potential problem.

[33] The Interpol constitution was adopted by the Interpol General Assembly in June, 1956. Ratification of the constitution does not require formal approval by member countries. All countries represented at Interpol are deemed to be Interpol members unless they subsequently declare through appropriate governmental authority that they cannot accept the constitution. The United States has never submitted any such nonacceptance declaration. The Interpol constitution has not been expressly approved by the Executive Branch or Congress. *See* Report of the Comptroller General of the United States, "United States Participation in INTERPOL, The International Criminal Police Organization" (Dec. 27, 1976) at 9, 25. Interpol is not listed as an "international organization" for purposes of immunity under the International Organizations Immunities Act, 22 U.S.C. § 288.

Somewhat more difficult questions are presented under the domestic laws of the various countries that participate in Interpol. Particularly as the exchange of information among NCBs increases with implementation of the F.I.R. project, individuals of one country who are damaged by disclosures of information through Interpol may seek redress based on a variety of legal theories, such as defamation or invasion of privacy.[34] In the simplest situation, where an NCB in country A discloses information to an NCB in country B, and a person aggrieved by that disclosure sues in one of those countries, a conflict of law question would be presented as between the jurisdiction or substantive law of country A and country B which could probably be handled under existing principles of conflicts of law. *See Restatement of the Foreign Relations Law of the United States* (2d) § 40. Exchanges of information through the Interpol General Secretariat are more difficult because they would raise the possibility that the jurisdiction and law of yet another country (France) may be invoked. If the F.I.R. project is implemented, the conflicts problems could become yet more complicated, because information could be switched through a number of countries, either by design or for technical reasons, on its way between country A and country B.[35] The OECD Guidelines and Council of

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[34] For example, in recent years at least two suits involving disclosures by the USNCB or by the Interpol General Secretariat have been filed in United States courts, both seeking recovery for alleged defamation by an official of the USNCB or by the General Secretariat in connection with requests forwarded through Interpol to detain or arrest an individual. *See Steinberg* v. *International Criminal Police Organization*, 672 F.2d 927 (D.C. Cir. 1981); *Sami* v. *United States*, 617 F.2d 755 (D.C. Cir. 1979). In both decisions, the court discussed only jurisdictional questions arising under United States law, and did not address possible conflicts of law questions. In *Sami* v. *United States*, the court held that the Interpol General Secretariat was not "doing business" in the District of Columbia for purposes of exercise of the D.C. long-arm statute, D.C. Code §§ 13–334. The claim in that case arose out of communications made by an official of the USNCB to the German NCB through Interpol channels, requesting arrest of plaintiff, a citizen of Afghanistan, on the basis of an outstanding Florida warrant. By contrast, in *Steinberg* v. *International Criminal Police Organization*, the same court held that there was *in personam* jurisdiction over Interpol under the same statute, where the claim involved Interpol's transmission of a publication (a "Blue Notice" requesting arrest) into the District of Columbia. The court distinguished its result from that reached in *Sami* on the basis that the *Steinberg* case involved "an invocation of specific, not general, adjudicatory authority." Slip op. at 5. The court noted that it did not intend by its holding to foreclose any other defense, "jurisdictional or otherwise," that Interpol or its Secretary General might raise. *Id.* at 12, n.13.

[35] A recent article has hypothesized the following situation to illustrate the problem. The health records of a Swiss national are collected by his employer in Switzerland, and transmitted to corporate headquarters in Amsterdam where they are processed, stored, and aggregated with health records of other nationals working in other countries. The aggregated data are then sent on via international facilities to a United States-owned data processing service in the United States. While they are being held in that facility, however, the main computer breaks down and an automatic switch sends the data through international telecommunications facilities on to a secondary processing facility in Hong Kong. The data are processed there and returned to the primary facility in the United States. A copy of the processed data is sent to storage at the primary site and the data are returned to Amsterdam. The employer then sends it along to the employer's insurance carrier, an Italian firm whose primary data processing facilities are stored in Spain. The insurance carrier again processes the data, stores them in Madrid on magnetic tape, and issues the appropriate group health policy to the employer. *See* Fishman, *Introduction to Transborder Data Flows*, 16 Stan. Int'l L.J. 1, 21 (1980). While this example is drawn from the private processing of data, it is not difficult to imagine equally convoluted trails for exchanges of criminal history information through F.I.R.

Europe Convention recognize that existing conflicts of laws principles may not be adequate to deal with exchanges of information through automated data processing in the future. The OECD's Expert Group, which drafted the guidelines, specifically rejected any detailed rules on conflicts of law questions, following extensive debate. *See* Explanatory Memorandum (Appendix), ¶22. The final Guidelines provide only that "Member countries should work towards the development of principles, domestic and international, to govern the applicable law in the case of transborder flows of personal data." OECD Guidelines Part 5, ¶22. The Council of Europe Convention does not address the possible conflicts of laws questions, other than to require Parties to render "mutual assistance" in implementation of the Convention, including any assistance necessary to facilitate the exercise of rights under a Party's domestic privacy legislation by "any person resident abroad." Art. 14.

It is thus clear that before the F.I.R. project is implemented, the members of Interpol will have to grapple with potential conflicts of laws problems. Since the resolution of those problems has implications beyond those arising out of Interpol's activities, it may not be possible for the members of Interpol to reach a definitive consensus. It may be possible, however, to avoid or mitigate some of the problems that may arise from technical operation of the system (*see* n.36 *supra*) in the way the system is structured. In the absence of concrete plans for the system, it is difficult for us to speculate on what the problems or possible solutions may be. We will, of course, be willing to work with you and other federal agencies to develop applicable principles and proposals, and to implement guidelines for operation of the F.I.R. system, if the project is approved.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Authority to Pay Witness Fees to Illegal Aliens

Aliens not legally entitled to be admitted to or reside in the United States who have been paroled for prosecution as defendants, who admit deportability, or who have been adjudged deportable under 8 U.S.C. § 1252(b), are not entitled to payment for appearing as witnesses in federal courts. 28 U.S.C. § 1821(e). However, aliens who are currently the subject of deportation proceedings but have not admitted deportability, or who have rendered themselves subject to deportation proceedings and do not admit deportability, are entitled to witness fees pursuant to 28 U.S.C. § 1821 in the amount of $30 per day.

Aliens determined to be excludable under 8 U.S.C. § 1226, whose removal has been stayed by the Attorney General so that they may testify on behalf of the United States or indigent criminal defendants, are entitled to witness fees in the amount of $1 per day. 8 U.S.C. § 1227(d); Rule 17(b), Fed. R. Crim. P.

Where the language of two or more appropriation accounts makes them equally available to pay certain expenses, and an administrative determination has been made to pay them out of one account rather than any other, Comptroller General rulings require the continued use of the appropriation account that has been selected. Accordingly, witness fees paid to excludable aliens pursuant to 8 U.S.C. § 1227(d) must in the future be made from the Department of Justice's "Fees and Expenses of Witnesses" (FEW) appropriation, rather than from the Immigration and Naturalization Service appropriation, since such fees have in the past been paid from the FEW appropriation.

December 21, 1981

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION

You have asked this Office to advise you as to the eligibility of aliens who are not legally entitled to be admitted to or reside in the United States for payment of witness fees and expenses for appearing in United States courts.[1] In addition, you have asked that we identify the statutory authorities that support our conclusions, and indicate the conditions and rates specified in those statutes. After receiving the views of your Division and the Immigration and Naturalization Service (INS),[2]

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[1] "Illegal" aliens are typically detained to testify in criminal proceedings against persons who allegedly smuggled them into the United States. *See, e.g., United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971), holding that deporting deportable aliens who are potential witnesses in a criminal proceeding against alleged smugglers before defense counsel has had an opportunity to interview them violates the defendants' rights to due process of law and compulsory process under the Fifth and Sixth Amendments to the Constitution.

[2] In response to your letter requesting our advice, we solicited the views of your Division and of INS as to these matters. The responses that we received reflect substantial agreement as to the proper construction of 28 U.S.C. § 1821 and 8 U.S.C. § 1227(d) (Supp. II 1978), as well as the appropriations available for payment of witness fees under these provisions. The responses differed only in that INS,

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and examining the pertainent statutes, we conclude that aliens paroled for prosecution as defendants, or who admit deportability or have been adjudged deportable under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b), are entitled to no payment at all for appearing as witnesses in federal courts. Aliens who are currently the subject of deportation proceedings and do not admit deportability, or who have rendered themselves subject to deportation proceedings by, *e.g.*, violating their status, and do not admit deportability, but have not yet been issued an order to show cause, are entitled to witness fees pursuant to 28 U.S.C. § 1821 in the amount of $30 per day. Finally, § 237(d) of the Immigration and Nationality Act, 8 U.S.C. § 1227(d), authorizes payments of $1 per day to excludable aliens whose removal has been stayed by the Attorney General for the purpose of providing testimony, in criminal proceedings on behalf of the United States, or, pursuant to Rule 17(b) of the Federal Rules of Criminal Procedure, on behalf of defendants who are unable to pay witness fees. Payments under both provisions are authorized to be made out of the Department's "Fees and Expenses of Witnesses" (FEW) appropriation.

I.

The general statutory provision which mandates payment of specified fees and allowances to witnesses "in attendance at any court of the United States" is 28 U.S.C. § 1821. Under this section, witnesses are entitled to a $30 per day attendance fee, 28 U.S.C. § 1821(b) (Supp. II 1978), and a travel allowance for expenses incurred in travelling to and from the courthouse. 28 U.S.C. § 1821(c) (Supp. II 1978).[3]

Section 1821 specifically excludes three categories of aliens from the fee and allowance provisions that are generally applicable to other witnesses in federal courts. 28 U.S.C. § 1821(e) (Supp. II 1978).[4] The first category of aliens not covered by the general witness fee provision includes aliens who, pending the determination of their applications for admission into the United States, are temporarily paroled into this country at the discretion of the Attorney General, for prosecution

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reflecting its expertise in such matters, noted the existence of various categories of "illegal aliens," and clarified the distinction between "excludable" and "deportable" aliens, for purposes of 8 U.S.C. § 1227(d).

[3] In addition, this section provides that witnesses whose testimony is material to a criminal proceeding and whose appearance or testimony may not be secured by subpoena or deposition may be detained pursuant to 18 U.S.C. § 3149, and are entitled to a $30 attendance fee for each day of confinement. 28 U.S.C. § 1821(d)(4) (Supp. II 1978). However, both the House and Senate reports to the 1978 amendments of § 1821 clearly state that the section referring to detained material witnesses is not intended to apply to "illegal aliens." *See* H.R. Rep. No. 1651, 95th Cong., 2d Sess. 5 (1978); S. Rep. No. 756, 95th Cong., 2d Sess. 4 (1978).

[4] 28 U.S.C. § 1821(e) (Supp. II 1978) provides:

> An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

under the laws of the United States. *See, e.g., Klapholz* v. *Esperdy,* 302 F.2d 928 (2d Cir.), *cert. denied,* 371 U.S. 891 (1962). Aliens thus paroled are not deemed to be "admitted" into the United States, and after their prosecution are returned to the custody from which they were paroled for resumed processing of their applications. 8 U.S.C. § 1182(d)(5) (Supp. II 1980).[5] The second category of aliens excluded from the witness fee provision of § 1821 includes aliens who have already entered the United States—either through formal admissions procedures or surreptitious entry—and admit belonging to a class of deportable aliens,[6] thereby requesting voluntary departure without the necessity of deportation proceedings under 8 U.S.C. § 1252(b). The third category of aliens who are not entitled to witness fees under § 1821 consists of aliens who, after administrative proceedings pursuant to 8 U.S.C. § 1252(b), have been found to be deportable.

Notwithstanding the wide sweep of § 1821(e), there do exist some categories of aliens residing illegally in the United States which Congress has not specifically excluded from coverage under the general witness fee provisions of § 1821, and are entitled, we believe, to receive fees and allowances pursuant to that section. These categories include aliens who, at the time of the proceeding in which they give testimony, are the subjects of deportation proceedings but have not admitted deportability. An additional category of "illegal" aliens who are entitled to receive fees under § 1821 are those aliens who have overstayed their authorized time, violated their status, or otherwise rendered themselves amenable to deportation proceedings, but have not yet been issued an order to show cause and have not admitted deportability. Although the Justice Management Division did not specifically identify this category of "illegal" aliens as separate and distinct from those who have admitted being, or been found to be, deportable, we believe that the distinction drawn by INS is a sound one. Congress' failure to include these two categories of aliens in §1821(e), which lists the various classes of aliens excluded from the fees and allowances provision contained in § 1821, is consistent with the fact that the status of the aliens in these two categories has not yet been adjudicated.

An additional category of "illegal" aliens not specifically excluded from the witness fees provisions of § 1821 are aliens who are excludable under § 236 of the Immigration and Nationality Act, 8 U.S.C. § 1226. Excludability under this section refers to aliens who have applied for, but have not yet been granted, admission into the United States, or who have been paroled into this country for a limited purpose—in other words, aliens who have not yet "entered" the United States in the contemplation of law. Because there is a more specific statutory authorization for witness fees for aliens in this category under the Immigration and Nationality Act, we do not believe that Congress intended that excludable aliens be covered under the general witness fee provisions in 28 U.S.C. § 1821.[7] Section 237(d) of the Immigration and Nationality Act, 8 U.S.C. § 1227(d), authorizes the Attorney General to stay the removal of any alien determined to be excludable under § 1226 "if in his judgment the testimony of such alien is necessary on behalf of the United States in the prosecution of offenders against . . . [the] laws of the United States," and entitles such aliens to a witness fee of $1 per day for each day that they are detained in the custody of the United States.[8]

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[5] Section 1182(3)(5) of Title 8 provides:

> The Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

[6] Section 241(a) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a), catalogues the classes of deportable aliens.

Although § 1227(d) limits payments under this section to witnesses who testify on behalf of the United States, Rule 17(b) of the Federal Rules of Criminal Procedure [9] authorizes the payment of fees to witnesses who are subpoenaed to appear on behalf of defendants in criminal proceedings, who are unable to pay the fees "in the same manner in which . . . fees are paid . . . [to] a witness subpoenaed on behalf of the government." Thus, aliens determined to be excludable under 8 U.S.C. § 1226, whose removal is stayed for the purpose of testifying on behalf of indigent criminal defendants, are entitled to $1 for each day that they are so detained. Because the fees provision contained in § 1227(d) is limited to aliens detained pursuant to *that* subsection, aliens who have been found to be deportable under § 1252 who have been subpoenaed to testify and are detained for that purpose are not entitled to witness fees under § 1227(d).

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[7] *See* 2A Sands, Sutherland Statutory Construction § 51.05 (4th ed. 1973).

> Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.

Id. at 315 (footnotes omitted).

[8] Section 237(d) of the Immigration and Nationality Act, 8 U.S.C. § 1227(d), provides in pertinent part:

> The Attorney General . . . may stay the deportation of any alien deportable under this section, if in his judgment the testimony of such alien is necessary on behalf of the United States in the prosecution of offenders against any provision of this chapter or other laws of the United States. The cost of maintenance of any person so detained resulting from a stay of deportation under this subsection and a witness fee in the sum of $1 per day for each day such person is so detained may be paid from the appropriation for the enforcement of this subchapter.

[9] Rule 17 (b) provides:

> The Court shall order at any time that a subpoena be issued for service on a named witness upon an *ex parte* application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

Fed. R. Crim. P. 17(b).

II.

The Justice Management Division has informed us that payments made to witnesses pursuant to 28 U.S.C. § 1821 and 28 U.S.C. § 1227(d) are authorized by, and, in the past have been made from, the Department's FEW appropriation. While witness fees paid to excludable aliens under § 1227(d) are authorized to be made from the INS appropriation, we believe that the INS appropriation need not be the exclusive source of such payments, and that the FEW appropriation is also available for that purpose.

Section 1227(d) provides that "[t]he cost of maintenance of any person . . . detained . . . under this subsection and a witness fee in the sum of $1 per day for each day such person is so detained may be paid from the appropriation for the enforcement of this subchapter." The current INS appropriation refers generally to "expenses, not otherwise provided for, necessary for the administration and enforcement of the laws relating to immigration . . .," but does not refer specifically to witness fee payments. H.R. 7584, 96th Cong., 2d Sess. (1980), enacted in part in the Continuing Appropriations for Fiscal Year 1981, Pub. L. No. 96-536, § 101(o), 94 Stat. 3169 (1980), and 1982, Pub. L. No. 97-92, 95 Stat. 1183 (1981). The Department's FEW appropriation is not limited to fees paid under § 1821; rather, it provides generally for "expenses, mileage, compensation, and per diems of witnesses and for per diems in lieu of subsistence, as authorized by law. . . ." *Id.*

Thus, while the language of neither appropriation specifically authorizes witness fee payments to be made to aliens who are not legally entitled to reside in the United States, the language of both appropriations reasonably may be construed to authorize such expenditures. In these circumstances, the Comptroller General has opined that "the administrative determination as to which of the two [appropriations] shall be used will not be questioned by the accounting officers." 23 Comp. Gen. 827 (1944); 5 Comp. Gen. 479 (1926). Moreover, the Comptroller General has required the continued use of the appropriation which has been selected, "to the exclusion of any other for the same purpose . . . in the absence of changes in the appropriation acts." 23 Comp. Gen. 827 (1944). *See* 10 Comp. Gen. 440 (1931). Because the Department has elected in the past to pay witness fees pursuant to 8 U.S.C. § 1227(d) out of the FEW appropriation, and the 1982 appropriation, Pub. L. No. 97-92 (1981), does not modify the language of the 1981 appropriation, Pub. L. No. 96-536, § 101(o), 94 Stat. 3169 (1980), we conclude that the FEW appropriation must continue to be made available for such payments.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Computation of 90-Day Period for Preliminary Investigation Under the Special Prosecutor Act

The 90-day period for the Attorney General's preliminary investigation under the Special Prosecutor provisions of the Ethics in Government Act should be computed from the day when the specific information is effectively received by the Department of Justice. In this case, the 90-day period began to run when the Attorney General himself was apprised of the allegations against the Secretary of Labor, and ordered the preliminary investigation commenced.

December 21, 1981

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

You have asked for the opinion of this Office concerning the timing of the commencement of the 90-day period for the Attorney General's preliminary investigation under the Special Prosecutor provisions of the Ethics in Government Act of 1978. 28 U.S.C. §§ 591–598 (Supp. III 1979). More particularly, you have asked whether the 90-day period commences at the moment that the first Department of Justice employee receives specific information that an official covered by the statute has committed a crime, even if the significance of that information relative to the Special Prosecutor provisions is not appreciated by the individual receiving it, the information is not reported to the Attorney General, or if the preliminary investigation process has not been initiated until a substantial period of time has elapsed.

You have asked this question in connection with allegations regarding the Secretary of Labor that were received by an Organized Crime and Racketeering Strike Force attorney and reported to a Strike Force Chief in New York sometime in September 1981. The information was not reported to the Criminal Division of the Department of Justice in Washington and to the Attorney General until December 1981, when a preliminary investigation under the Special Prosecutor provisions was immediately commenced.

For the reasons discussed below, we conclude that under the circumstances presented here, the 90-day period should be computed from the day when the information was effectively received by the Department in Washington and the preliminary investigation actually began.

Discussion

The Special Prosecutor provisions of the Ethics in Government Act provide in pertinent part as follows:

> (a) The Attorney General, upon receiving specific information that any of the persons described in section 591(b) of this title has engaged in conduct described in section 591(a) of this title, shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate.
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> (b)(1) If the Attorney General, upon completion of the preliminary investigation, finds that the matter is so unsubstantiated that no further investigation or prosecution is warranted, the Attorney General shall so notify the division of the court specified in section 593(a) of this title, and the division of the court shall have no power to appoint a special prosecutor . . . .
>
> (c)(1) If the Attorney General, upon completion of the preliminary investigation, finds that the matter warrants further investigation or prosecution, or if ninety days elapse from the receipt of the information without a determination by the Attorney General that the matter is so unsubstantiated as not to warrant further investigation or prosecution, then the Attorney General shall apply to the division of the court for the appointment of a special prosecutor . . . .

28 U.S.C. § 592. In essence, the text of the statute provides that when the *Attorney General* receives specific information, the *Attorney General* shall conduct an investigation for a period not to exceed 90 days and the *Attorney General* shall make certain reports to the court. A strict construction of this text would lead to the conclusion that the 90-day period does not begin until the Attorney General himself receives the specific information. Although standing alone this is a very plausible construction of the clause dealing with receipt of the specific information, it is arguably not as persuasive an interpretation when considered in connection with the mandate in the succeeding clause for the Attorney General to conduct the preliminary investigation. Clearly, Congress did not intend that the Attorney General would personally conduct every aspect of the preliminary investigation.[1] Since the second clause might be read

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[1] In addition to the strong argument that can be made on the basis of practice and common sense, the legislative history of the statute makes it quite clear that Congress did not anticipate that the Attorney General personally would participate in all aspects of the preliminary investigations required by the Act. *See, e.g.*, S. Rep. No. 170, 95th Cong., 1st Sess. 63 (1977).

generically to mean that the Department of Justice should conduct the preliminary investigation, it can be argued that this casts doubt upon the literal reading of the term Attorney General in the first clause.

In our view, however, there is no real inconsistency in the several uses of the term Attorney General in the text of the statute, and we have little doubt that the term connotes and recognizes a personal role for the Attorney General in implementing each phase of the Special Prosecutor provisions. As we read the text, the statute anticipated that the Attorney General would be apprised of specific information (either by his subordinates or by an outside source); that he would immediately direct a preliminary investigation; [2] and that he would make the determinations required by the Act within 90 days of his receipt of the information and commencement of the investigation.[3]

In light of the argument that could be made for a different construction of the text of the statute, and the importance of adhering closely to the congressional intent, we have also scrutinized the legislative history of the statute. We have not found that the legislative history expresses any clear congressional intent with respect to whether the 90-day investigation period commences with the receipt of information by the Attorney General or by any other Department of Justice employee. However, our review of the legislation history has convinced us that our position on this question is fully consistent with the principles behind the Special Prosecutor legislation and the specific interests that Congress intended to serve by providing for a 90-day preliminary investigation.

The legislative history identifies two somewhat conflicting interests to be served by the 90-day preliminary investigation. On the one hand, Congress limited the time to conduct a preliminary investigation because of a concern that Special Prosecutor matters be resolved promptly and credibly by an independent entity. This concern is reflected in the following statement from the Senate report on the bill:

> The statute contains a time limit on the period permitted for a preliminary investigation because the Committee

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[2] "Conducting" an investigation does not necessarily mean physically and personally carrying out each and every phase of the investigation. As you know, federal criminal investigations ordinarily are executed by persons working under the general supervision and direction of the Attorney General pursuant to powers delegated by the Attorney General. *See generally,* 28 U.S.C. § 531 and 28 CFR 0.55 and 0.85. In the same way, the Attorney General can be said to "conduct" a preliminary investigation under the Special Prosecutor provisions. The common definition of "conduct" embraces the concept of management, direction, or command. *See* Webster's Third New International Dictionary (1976) s.v. "conduct."

[3] Our interpretation is supported by the reference in 28 U.S.C. § 594 to the power and authority of the Special Prosecutor, who is expressly given "full power and independent authority to exercise all investigative and prosecutorial functions and powers of *the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice* . . . ." (Emphasis added.) Had the Congress intended that the 90-day preliminary investigation period commence instantly "upon [the receipt of] specific information" by any one of the Department's approximately 52,000 employees, it could have, and we presume it would have, used the language that it used in § 594.

> did not want serious allegations of criminal wrongdoing against individuals described in subsection 591(b) to remain in the Department of Justice and not be referred to the court for the appointment of a temporary special prosecutor simply because the Department had not even begun to conduct an investigation of the matter. Similarly, the Committee did not want the Department of Justice to conduct the full investigation of serious criminal allegations against the individuals described in subsection (b) of section 591 since the premise of the statute is that there is an institutional conflict of interest for the Department of Justice to conduct the investigation and prosecution of such cases. Therefore, such matters should be referred to the court for the appointment of a special prosecutor as soon as a preliminary investigation has indicated that the matter warrants further investigation and prosecution.

S. Rep. No. 170, 95th Cong., 1st Sess. 54 (1977).[4]

On the other hand, Congress realized that some period of preliminary investigation by the Justice Department was necessary to weed out the frivolous cases from those of substance. *See* S. Rep. No. 170, *supra*, at 54. The preliminary investigation protects the interests of the subject official in avoiding the appointment of a Special Prosecutor on totally unsubstantiated or frivolous allegations. This concern for fairness to the subject was recently reiterated by the Subcommittee on Oversight of Government Management of the Senate Governmental Affairs Committee when it endorsed a proposed amendment to the Act that would permit limited extensions to the 90-day investigation in appropriate circumstances:

> Because of the serious consequences which a special prosecutor appointment has on the subject of the investigation, however, the Subcommittee believes that the special prosecutor process should not be triggered simply because the Department of Justice has been unable to complete the fact-finding necessary to make a proper determination within an inflexible time frame.

Subcommittee on Oversight of Government Management, Senate Governmental Affairs, 97th Cong., 1st Sess. 44, Special Prosecutor Provisions of Ethics in Government Act of 1978 (Comm. Print 1981).

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[4] We recognize that the first sentence of this statement indicates a clear congressional intent that there be no unnecessary or deliberate delay by the Justice Department in initiating preliminary investigations. However, the last sentence of the statement makes it equally clear that Congress anticipated that there would be some preliminary investigation before a matter is referred to a Special Prosecutor. We believe that our construction of the statute makes it possible to achieve both of these goals.

In balancing these interests, we find that the purposes of the Act are best served by an interpretation that focuses on the effectiveness of the notice received, rather than on the instant of the receipt of the information by any Justice employee. Effective notice, in our view, must be notice sufficient to permit accomplishment of the purposes of the Act. For example, in this case we conclude that the information concerning the Secretary of Labor was not effectively received until December, when the information reached Washington, and the Attorney General ordered the preliminary investigation. Prior to this time, the Attorney General was incapable of either conducting an investigation or requesting a Special Prosecutor because he was unaware of the allegations. This construction guarantees that the subject official will have the benefit of as complete a preliminary inquiry as the Attorney General deems appropriate, within the constraints of the Act, including the 90-day investigative time limit. While we recognize that this approach may appear to favor the interest in fairness to a subject over the public interest in prompt resort to a Special Prosecutor where the circumstances require it, we believe that this is a proper result in this case, given the magnitude of each interest and the potential harm to each should full deference be given to the competing interest.[5]

We believe that the construction of the law we have articulated is the most faithful construction of its terms and congressional intent under the circumstances presented. Congress determined that a preliminary investigation was necessary in the interest of fairness to the accused and as a matter of institutional and public interest to protect against the appointment of special prosecutors every time a baseless, frivolous, or malicious accusation is made against a government official. A 90-day period was considered an appropriate time for such an investigation. Congress vested in the Attorney General responsibility for conducting an appropriate investigation to eliminate those charges, which are "so unsubstantiated that no further investigation or prosecution is warranted." It would be destructive of this intent—and contrary to the plain words of the statute—to construe the law in a way which can require the appointment of a Special Prosecutor before any investigation at all or after an unreasonably brief interval. Ninety days, or at least something close to it, should be available to the Attorney General for the preliminary investigation.

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[5] Of course, in determining the appropriate length of the preliminary investigation in particular cases, the Attorney General is obliged to consider the full facts and give appropriate deference to each of these interests. In this case, for example, he must consider the statute of limitations in determining what portion of the 90-day investigative period he should utilize. Certainly, an imminent expiration of the limitations period would increase the weight of the public interest in promptness, in the balance against the subject's interest in a fair and proper preliminary investigation.

Another factor that the Attorney General should consider in determining the length of this particular preliminary investigation is the possibility of conducting a sufficient and fair inquiry within a period of time as close as possible to 90 days of the Strike Force attorney's receipt of the information. In the past, the Department has been able to make a Special Prosecutor determination with 90 days of the first known receipt of specific information by a Department employee. In fact, the Criminal Division admonished its attorneys by memorandum dated April 5, 1979, that "the ninety days starts running when the information is 'received' by the Department (presumably including the FBI)." We concur completely with this admonition to employees to conduct themselves as if their receipt of any information that might trigger the Act marks the commencement of the 90-day period. While this Criminal Division memorandum does not purport to be a Department of Justice legal opinion, and does not, in our view, accurately state the law, it is a sound and prudent management requirement. It is in the interest of the Department, the subject official, and the public that the Department react quickly to any allegations of misconduct by high government officials.

Finally, you should be aware of another legal opinion prepared by this Office which discusses, for purposes of applying the "effective date" provisions of the Act, the time when information should be deemed received by the Department. In the situation at issue there, the information was received in pieces, and the problem was to determine when it became specific information sufficient to trigger the Act. There was no question of effective notice in that case.

Our view concerning the commencement of the 90-day preliminary investigation period should not be construed as endorsing any system that would intentionally insulate the Attorney General from prompt notice of information triggering the requirements of the law, or approving any delay in the commencement of the period in a factual situation in which the Attorney General would be considered as having constructive notice of such information.

In reaching these conclusions, we have given considerable attention to the responsibility of all Department employees to see that the laws are faithfully executed. Although we are confident that the difficulties in implementing the statute in this case were the product of inattention, rather than bad faith, we think that the Attorney General may wish to consider taking corrective action to prevent such errors in the future. As you know, the Deputy Attorney General and the Criminal Division have in the past sent various directives to Department personnel designed to facilitate the prompt reporting of information, and the expeditious handling of Special Prosecutor matters (*see* note 5, *supra*). At the least, the Department should reiterate its advice to employees on this subject. We may also wish to explore the feasibility of a regulation that would delegate functions and set forth procedures for implementing the Special Prosecutor provisions. We would be happy to assist in such a project, should it be undertaken.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Peyote Exemption for Native American Church

Regulation of the Drug Enforcement Administration (DEA) exempting peyote use in connection with the religious ceremonies of the Native American Church (NAC) from the controls and sanctions of the Controlled Substances Act of 1970 (CSA), accurately reflects Congress' intent to exempt the religious use of peyote by the NAC and other bona fide religions in which the use of peyote is central to established religious beliefs, practices, dogmas, or rituals.

An exemption for peyote use by the NAC would not violate the Establishment Clause of the First Amendment if the NAC had a constitutional right under the Free Exercise Clause to use peyote for religious purposes.

The NAC is an established religion, in whose history the sacramental use of peyote is firmly grounded, and in whose doctrine and ritual the use of peyote is central. Nonetheless, it is likely that Congress could, consistently with the Free Exercise Clause, constitutionally restrict or prohibit the continued religious use of peyote if this were the least restrictive means of achieving a compelling governmental purpose.

The exemption for the religious use of peyote contained in the CSA does not offend the Establishment Clause even if it is not required by the Free Exercise Clause. Under relevant Supreme Court precedent, the government may take actions necessary to avoid substantial interference with religious practices or beliefs, even if such actions are not required by the Free Exercise Clause, provided that the actions do not impose hardship on others or amount to government sponsorship or support of religion.

A statutory exemption limited to the NAC, to the exclusion of other religions whose use of peyote is central to established religious beliefs or practices, would be unconstitutional under the Establishment Clause if it discriminated among otherwise equally situated religions. No different conclusion would be required because the "preferred" religion is composed of American Indians, since the special treatment of Indians under our law is grounded in their unique status as political entities, not in their religion or culture. On the other hand, since no group other than the NAC is likely to be able to establish its entitlement to the exemption, the DEA would be justified in adopting procedures designed to minimize the administrative burdens of extending the exemption to other groups.

December 22, 1981

MEMORANDUM OPINION FOR THE CHIEF COUNSEL, DRUG ENFORCEMENT ADMINISTRATION

Peyote, a hallucinogenic cactus, is listed as a Schedule I controlled substance in the Controlled Substances Act of 1970 (CSA), 21 U.S.C. §§ 801–966, and is subject to rigorous controls and sanctions with respect to manufacture, transfer, and possession. Your agency has interpreted the CSA to exempt peyote use in the religious ceremonies of the Native American Church (NAC), an American Indian religion. You have requested that this Office examine three issues arising in connection with the foregoing exemption: (1) what is the scope of the statutory exemption; (2) is the exemption constitutional; and (3) would it be constitutional to exempt only American Indian peyotists to the exclusion of other religious users of the drug.

We conclude, first, that Congress intended to exempt peyote use by the NAC and other *bona fide* peyote-using religions in which the actual use of peyote is central to established religious beliefs, practices, dogmas, or rituals. In administering this exemption, your agency could, consistently with the congressional intent, regard the absence of a significant history of such use as a meaningful or even presumptive factor in determining the availability of the exemption. As a practical matter, we believe that no religions other than the NAC would qualify for the exemption. Second, we conclude that the exemption as we have interpreted it does not offend the Establishment Clause of the First Amendment. Third, we conclude that it might well offend the Establishment Clause to limit the exemption to American Indian peyotists.

I. Scope of the Statutory Exemption

The CSA's listing of peyote as a Schedule I controlled substance does not contain any express exemptions.[1] The exemption for the NAC is found in a regulation of your agency, 21 C.F.R. § 1307.31, which provides:[2]

> The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

This regulation is strictly an interpretative rule which construes the CSA in light of its legislative history; your agency does not assert authority to create nonstatutory exemptions from the listing of a substance in Schedule I.

The manufacture or distribution of peyote was first prohibited by federal law in the Drug Abuse Control Act Amendments of 1965 (1965 Amendments).[3] This statute's origin was in S. 2628, a bill which passed

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[1] 21 U.S.C. § 812(c) Schedule I(c)(12). Schedule I substances are those which have a high potential for abuse, have no currently accepted medical use in treatment in the United States, and lack accepted safety for use under medical supervision. *Id.* § 812(b)(1). The CSA subjects Schedule I substances to stringent registration, labelling, and recordkeeping requirements, and imposes criminal penalties for their unauthorized manufacture, possession, or transfer.

[2] *See also* 21 C.F.R. §320.3 (similar regulation of Department of Health and Human Services).

[3] Peyote was classified as a "narcotic" in the Narcotic Farm Act of 1929, 45 Stat. 1085, to enable peyote "addicts" to seek treatment at federal facilities. The Food, Drug and Cosmetic Act of 1938 also

Continued

the Senate during the Second Session of the 88th Congress. S. 2628 would have imposed controls on "psychotoxic drug[s]," which, as defined, included peyote.[4] There was no exemption for Indian religious use of the substance.[5] The Senate passed S. 2628 prior to the ruling of the California Supreme Court, in *People* v. *Woody,* 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964), that the Free Exercise Clause of the First Amendment prohibited the state from prosecuting a member of the NAC for using peyote in religious practices. The 88th Congress expired before the House had an opportunity to vote on S. 2628.

H.R. 2, introduced and passed in the House the following year, was similar in most essential respects to S. 2628. However, H.R. 2 explicitly provided that the term "depressant or stimulant drug" did not include "peyote (mescaline) but only insofar as its use is in connection with the ceremonies of a bona fide religious organization." *See* H.R. Rep. No. 130, 89th Cong., 1st Sess. 35 (1965). The purpose for the peyote exemption in H.R. 2 does not appear in the legislative history.[6]

H.R. 2 was introduced in the Senate and referred to the Committee on Labor and Public Welfare, which recommended passage of the bill but proposed to drop the special peyote exemption.[7] The Senate report explained this recommendation as follow:

> The Committee determined that it would not be desirable to specify drugs other than barbiturates and amphetamines as subject to the controls of the bill, but determined that the other classes of drugs are to be brought under control of the bill on a case-by-case basis by the Secretary of Health, Education and Welfare under the standards prescribed in the legislation. In accordance with this determination, the committee omitted specific reference to peyote as a substance subject to the provisions of the legislation. It is expected that peyote will be subject to the same consideration as all other drugs in determining whether or not it should be included under the provisions of the legislation.

S. Rep. No. 337, 89th Cong., 1st Sess. 3 (1965). The measure passed the Senate without further discussion of the peyote exemption.

When the Senate version of the bill, without the peyote exemption, was brought up for debate in the House, Congressman Harris, the Chairman of the Committee on Interstate and Foreign Commerce,

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classifed peyote as a narcotic or hypnotic substance, 52 Stat. 1050, and imposed certain labelling requirements. Neither statute prohibited the manufacture or distribution of peyote.

[4] *See* 110 Cong. Rec. 19,780 (1964).

[5] The Senate committee hearings on S. 2628 contain no reference to the religious use of peyote. *See Hearings on S. 2628 before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare,* 88th Cong., 2d Sess. (1964).

[6] *See* H.R. Rep. No. 130, 89th Cong., 1st Sess. (1965); Hearings on H.R. 2 Before the House Comm. on Interstate & Foreign Commerce, 89th Cong., 1st Sess. (1965).

[7] The Senate committee did not hold hearings on the measure.

which had jurisidiction over the bill, gave the following explanation of the Senate amendment:

> Mr. Harris. The last amendment of substance made by the Senate deletes the provisions of the House bill which provided that the term "depressant or stimulant drug" does not include peyote used in connection with ceremonies of a bona fide religious organization.
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> Some concern has been expressed by many of the religious groups affected,[8] and by certain civil liberties organizations concerning the possible impact of this amendment on religious practices protected by the first amendment to the Constitution.
>
> Two court decisions have been rendered in this area in recent years. One, a decision by Judge Yale McFate in the case of *Arizona* v. *Attakai*, No. 4098, in the superior court of Maricopa County, Phoenix, Arizona, July 26, 1960; and a California decision, *People against Woody*, decided August 24, 1964, in the Supreme Court of California. Both these cases held that prosecutions for the use of peyote in connection with religious ceremonies was a violation of the first amendment to the Constitution.
>
> In view of all this, I requested the views of the Food and Drug Administration and have been assured that the bill, even with [*sic* without] the peyote exemption appearing in the House-passed bill, cannot forbid bona fide religious use of peyote.
>
> Mr. Speaker, I ask unanimous consent to include the letter from the Food and Drug Administration at this point in my remarks.
>
> Dear Mr. Chairman: In response to your request we are stating the position the Food and Drug Administration expects to take if H.R. 2 becomes law as it passed the Senate with respect to the use of peyote in religious ceremonies.
>
> We have been advised by a representative of the North [*sic* Native] American Church that this church is a bona fide religious organization and that peyote has bona fide use in the sacrament of the church. The representative has agreed to document both of these statements.
>
> If the church is a bona fide religious organization that makes sacramental use of peyote, then it would be our view that H.R. 2, even without the peyote exemption which appeared in the House-passed version, could not forbid bona fide religious use of peyote. We believe that the constitutional guarantee of religious freedom fully safeguards the rights of the organization and its communicants.
>
> Sincerely yours,
>
> *George P. Larrick,*
> *Commissioner of Food and Drugs*
>
> Mr. Speaker, in view of the foregoing, I recommend that the House agree to the Senate amendments to H.R. 2.

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[8] The legislative history does not explain which particular "religious groups" Congressman Harris was referring to.

111 Cong. Rec. 15,977–78 (1965). Shortly after the conclusion of these remarks, the House concurred in the Senate amendments.

In 1965, the Department of Health, Education and Welfare promulgated a regulation controlling peyote under the 1965 Amendments, but exempting the religious use of peyote by the NAC.[9] The exemption appears to have been based on the legislative history recited above.

Congress returned to the subject of drug abuse control in 1970 when it passed the CSA. That statute lists peyote as a controlled substance and, as noted above, does not provide for an exemption for the NAC or any other religion. However, officials of the Bureau of Narcotics and Dangerous Drugs [10] testified as to the effect of the proposed statute in hearings before the House Committee: [11]

> Mr. Satterfield. I have one other question. I recall when we were discussing dangerous drugs a few years ago, the question came up about the Native American Church involving Indians in the west who use and have for centuries used peyote in connection with religious services. It is my understanding that they enjoy an exemption under the current law.
>
> My question is whether any of the bills we have before us, if passed, would in any way affect this present exemption?
>
> Mr. Ingersoll. Mr. Sonnenreich [Deputy Chief Counsel of BNDD] has just conducted a hearing on that subject and if you will permit him, I would like him to respond to that.
>
> Mr. Satterfield. Yes.
>
> Mr. Sonnenreich. In the first instance, Mr. Satterfield, the Native American Church did ask us by letter as to whether or not the regulation, exempting them by regulation, would be continued and we assured them that it would because of the history of the church. We presently are involved in another hearing regarding another church that is a non-Indian church that is seeking the exemption and the order is going to be published, I believe, either

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[9] That exemption read as follows:

> The listing of peyote in this subparagraph does not apply to the nondrug use in bona fide religious ceremonies of the Native American Church; however, persons supplying the product to the Church are required to register and maintain appropriate records of receipts and disbursements of the article.

21 C.F.R. § 166.3., now codified at 21 C.F.R. § 320.3.

[10] Responsibility for enforcing the 1965 Amendments was transferred to the Bureau of Narcotics and Dangerous Drugs by Reorganization Plan No. 1 of 1968.

[11] *Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce* 117–18 (1970).

> today or tomorrow denying them the same exemption as the Native American Church.[12]
>
> We consider the Native American Church to be *sui generis.* The history and tradition of the church is such that there is no question but that they regard peyote as a deity as it were, and we will continue the exemption.
>
> Mr. Satterfield. You do not see anything in the Senate bill that would make this impossible?
>
> Mr. Sonnenreich. No. Under the existing law originally the Congress was going to write in a specific exemption but it was then decided that it would be handled by regulation and we intend to do it the same way under this law.

After the passage of the CSA the Bureau of Narcotics and Dangerous Drugs promulgated the current regulation contained in 21 C.F.R. § 1307.31.[13]

The legislative history supports your agency's existing exemption for the use of peyote in the religious ceremonies of the NAC. In the case of the 1965 Amendments, the House proposed to exempt the *bona fide* religious use of peyote; the Senate dropped the exemption, not because it opposed the religious use of peyote but because it believed that specific reference to peyote would unnecessarily interfere with the discretion which Congress intended to vest in the administrative agency to determine which substances were to be brought under control of the bill. The House accepted the Senate's version only after receiving assurances from the agency which was to administer the statute that the religious use of peyote by the NAC would not be prohibited. Similarly, the CSA was passed against the backdrop of an administrative exemption granted to the NAC under the 1965 Amendments. There was no indication in the legislative history that Congress intended to eliminate the exemption. On the contrary, the House received assurances from the Bureau of Narcotics and Dangerous Drugs that the exemption would be contained under the new statute.

The legislative history could be interpreted to support an exemption only for the NAC, and not for other religious groups. Although the House version of H.R. 2 would have exempted the ceremonial use of peyote by all *bona fide* religious organizations, the House ultimately accepted the Senate version of the 1965 Amendments after receiving assurances which had specific reference only to the NAC. Similarly, the administrative exemption in effect at the time the CSA was passed applied only to the NAC. Officials of the Bureau of Narcotics and Dangerous Drugs informed the Congress of this fact, of the fact that they were about to deny an exemption to a non-Indian church, and of their opinion that the NAC was "sui generis." These officials strongly emphasized what they believed to be the unique history and tradition of the NAC as a peyote-using religion. Thus, it would be reasonable to interpret the legislative history as reflecting a congressional intent to "grandfather" the NAC, because of its special historical status, but not to create any broader exemption.

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[12] The non-Indian church referred to by Mr. Sonnenreich styled itself the "Church of the Awakening." The agency's opinion denying a peyote exemption is published at 35 Fed. Reg. 14789 (1970). The Church of the Awakening challenged this determination in the Ninth Circuit. In *Kennedy* v. *Bureau of Narcotics & Dangerous Drugs,* 459 F.2d 415 (9th Cir. 1972), *cert. denied,* 409 U.S. 1115 (1973), the court accepted the argument that an exemption limited to the NAC was unconstitutional, but declined to extend the exemption to the Church of the Awakening because that group had sought an exemption only for itself and not for all religious users of peyote.

[13] Your agency has succeeded to the responsibility for enforcing the CSA previously exercised by the Bureau of Narcotics and Dangerous Drugs.

The two federal courts which have interpreted the exemption, however, have arrived at a broader interpretation. In *Native American Church of New York* v. *United States*, 468 F. Supp. 1247 (S.D.N.Y. 1979) *aff'd mem.* 633 F. 2d 205 (2d Cir. 1980), a primarily non-Indian organization [14] sought a declaration that it had a right to use a variety of "psychedelic" substances, including peyote, for religious ceremonies. After examining the legislative history recounted above, the court held that the statutory exemption was available to *bona fide* religious organizations other than the NAC which use peyote for sacramental purposes and which regard the substance as a deity.[15] This holding was accepted and endorsed in a subsequent district court decision, *Lamantia* v. *Civiletti*, No. 80 Civ. 1534 (RLC) (S.D.N.Y. 1981).[16] In addition to these cases, the Ninth Circuit has held, as we discuss in greater detail below, that an exemption limited to the NAC which excluded other *bona fide* religious organizations would be unconstitutional. *Kennedy* v. *Bureau of Narcotics & Dangerous Drugs*, 459 F. 2d 415 (9th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973).

On balance, and in light of these cases, we are persuaded that the statutory exemption cannot be restricted in scope to the NAC. On the other hand, the legislative history does not support any broad exemption for the non-Indian use of peyote. In our view, the CSA exempts the religious use of peyote by the NAC and by other *bona fide* peyote-using religions in which the actual use of peyote is central to established religious beliefs, practices, dogmas, or rituals. As a practical matter, no group of which we are aware other than the NAC would meet this demanding standard.

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[14] The Native American Church of New York was not affiliated with the NAC notwithstanding the similarity of its name.

[15] At trial, however, the court concluded that the Native American Church of New York was not a *bona fide* religion and dismissed the case.

[16] The *Lamantia* case is currently awaiting trial in the Southern District of New York. [Note: After trial in this case, the court found that the statutory exemption was not available to the plaintiffs because they were not part of a *bona fide* religious organization. *Birnbaum* v. *United States*, 80 Civ. 1534 (RLC) (S.D.N.Y. April 11, 1983) (unreported opinion) (Carter, J.) Ed.]

II. Constitutionality

The First Amendment to the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The Establishment Clause generally prohibits the government from granting certain preferences to religions or religious adherents which are not available to secular organizations or nonreligious individuals. *E.g., Everson* v. *Board of Education,* 330 U.S. 1 (1947). Because the exemption for the *bona fide* religious use of peyote is arguably a preference granted to religion, the question arises whether the exemption violates the Establishment Clause. There could be no Establishment Clause violation if the NAC has a constitutional right under the Free Exercise Clause to use peyote for ceremonial purposes, notwithstanding the fact that nonreligious groups or individuals are prohibited from using the substance. *Wisconsin* v. *Yoder,* 406 U.S. 205, 234–35 n.22 (1972); *Sherbert* v. *Verner,* 374 U.S. 398, 409–10 (1963). Thus, we first consider whether the NAC has a constitutional right to use peyote for religious purposes. Second, we examine whether the exemption might be constitutional even if a right to the religious use of peyote is not guaranteed by the Free Exercise Clause.

A. Free Exercise Clause

The Supreme Court has recognized repeatedly that the Free Exercise Clause sometimes requires government to make special accommodations to the needs of religious individuals which are not made for the public at large.

Sherbert v. *Verner,* 374 U.S. 398 (1963), the leading case, involved a Seventh-day Adventist who was discharged from her employment for refusing to work on Saturday, her Sabbath. She was denied state unemployment benefits on the ground that her refusal to work on Saturdays rendered her ineligible. The Supreme Court observed that the State's action in effect penalized the exercise of her religion:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404. Because this burden on free exercise values was not justified by a compelling state interest, the Court held that the appellant had been unconstitutionally denied the unemployment compensation.

In *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), the Court held that a state could not constitutionally impose criminal punishment on Amish parents who removed their children from school after the eighth grade.

Application of the state's compulsory school attendance law was found to burden the exercise of the Amish religion by exposing children to worldly influences and interfering with their integration into a way of life that was inseparably intertwined with the Amish faith.

Finally, in *Thomas* v. *Review Board*, 450 U.S. 707 (1981), the Supreme Court struck down a state's action in denying unemployment benefits to a Jehovah's Witness who, believing that his religion prohibited participation in the making of armaments, quit his job after being transferred to a department manufacturing military equipment. The Court's analysis reaffirmed the reasoning in *Sherbert* v. *Verner, supra.*[17]

Attempts to invoke the principle of these cases as a defense against drug charges have generally been unsuccessful.[18] The federal courts have never addressed the question of whether the *Sherbert* principle requires that the NAC be exempted from the general prohibition on peyote use.[19] The early case of *State* v. *Big Sheep*, 75 Mont. 219, 243 P.

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[17] The Supreme Court addressed a related question in *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). In that case, a religious organization challenged the constitutionality of a state requirement that it distribute and sell religious literature and solicit donations at a state fair only at an assigned location within the fairgrounds. The Court held that the challenged regulation was a reasonable time, place, and manner restriction of speech. The organization apparently did not argue before the Supreme Court that its peripatetic solicitation—known as the "sankirtan"—was itself a religious practice protected by the Free Exercise Clause. The Supreme Court did not determine whether an otherwise reasonable time, place, and manner restriction could survive scrutiny under the Free Exercise Clause if a religious organization could establish that access to the forum in ways prohibited by the state regulation was central to its religious doctrine and practice. *Compare International Society for Krishna Consciousness, Inc.* v. *Barber*, 650 F. 2d 430. (2d Cir. 1981) (prohibition of peripatetic solicitation at state fair invalidated as unconstitutional burden on free exercise right to practice sankirtan; case was decided prior to *Heffron*.)

The Court may provide more guidance on the extent of accommodation required by the Free Exercise Clause this Term when it decides *United States* v. *Lee, prob. jurisdiction noted*, 450 U.S. 993 (1981). The district court in that case held that the Free Exercise Clause prohibited the government from requiring a member of the Old Order Amish religion to pay certain social security and unemployment insurance taxes, since the Amish religion considers it a sin to pay for or accept any form of social insurance outside of the self-sufficient Amish community. 497 F. Supp. 180 (W.D. Pa. 1980). The United States has taken a direct appeal to the Supreme Court. [NOTE: The Supreme Court reversed the district court, holding that the broad public interest in maintaining a sound tax system outweighed the Amish employer's conscientious objection to paying the tax: "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States* v. *Lee*, 455 U.S. 252, 261 (1982). Ed.]

[18] *See, e.g., United States* v. *Spears*, 443 F.2d 895 (5th Cir. 1971) (marijuana, heroin, and peyote), *cert. denied*, 404 U.S. 1020 (1972); *United States* v. *Hudson*, 431 F.2d 468 (5th Cir. 1970) (heroin and marijuana), *cert. denied*, 400 U.S. 1011 (1971); *Leary* v. *United States*, 383 F.2d 851 (5th Cir. 1967) (marijuana), *rev'd on other grounds*, 395 U.S. 6 (1969); *Randall* v. *Wyrick*, 441 F. Supp. 312 (W.D. Mo. 1977) (marijuana and LSD); *United States* v. *Kuch*, 288 F. Supp. 439 (D.D.C. 1968) (LSD); *People* v. *Mullins*, 50 Cal. App. 3d 61, 123 Cal. Rptr. 201 (1975) (marijuana); *Town* v. *State ex rel. Reno*, 377 So.2d 648 (Fla. 1979) (marijuana), *app. dismissed and cert. denied*, 449 U.S. 803 (1980); *State* v. *Brashear*, 593 P.2d 63, 92 N.M. 622 (1979) (marijuana); *Lewellyn* v. *State*, 489 P.2d 511 (Okl. Cr. 1971) (marijuana); *Gaskin* v. *State*, 490 S.W.2d 521 (Tenn.) (marijuana), *app. dismissed*, 414 U.S. 886 (1973); Annot., *Free Exercise of Religion as Defense to Prosecution for Narcotic or Psychedelic Drug Offense*, 35 A.L.R. 3d 939 (1971).

[19] *But cf. Leary* v. *United States, supra* (leaving question open); *Golden Eagle* v. *Johnson*, 493 F.2d 1179 (9th Cir. 1974) (holding that special procedural safeguards were not required before peyote could be seized from NAC member), *cert. denied*, 419 U.S. 1105 (1975); *Oliver* v. *Udall*, 306 F.2d 819 (D.C. Cir. 1962) (refusing to invalidate tribal ordinance prohibiting peyote use), *cert. denied*, 372 U.S. 908 (1963); *Native American Church* v. *Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) (same); *Native American Church of Navajoland, Inc.* v. *Arizona Corp. Comm'n*, 329 F. Supp. 907 (D. Ariz. 1971) (upholding refusal to grant incorporation to peyote-using church), *aff'd*, 405 U.S. 901 (1972).

1067 (1926), upheld the conviction of an NAC member under state law. But in *People* v. *Woody, supra,* the California Supreme Court held that the state could not, consistently with the First and Fourteenth Amendments, convict an NAC member for using peyote in religious observances. The court found that the state's interest in enforcing the statute against church members did not outweigh the "virtual inhibition of the practice of defendant's religion" which would have resulted from enforcement. *Woody* has been followed by two other state courts. *Whitehorn* v. *State,* 561 P.2d 539 (Okl. CR. 1977); *Arizona* v. *Whittingham,* 19 Ariz. App. 27, 504 P.2d 950 (1973), *cert. denied,* 417 U.S. 946 (1974). *Contra, State* v. *Soto,* 21 Or. App. 794, 537 P.2d 142 (Or. App. 1975), *cert. denied,* 424 U.S. 955 (1976). At least two states have enacted statutes exempting NAC peyote use from state prohibitions. Montana Stat. 94–35–123; New Mexico Stat. 54–5–16. Montana's statute, which legislatively overruled *State* v. *Big Sheep, supra,* was upheld in *State ex rel. Offerdahl* v. *District Court,* 156 Mont. 432, 481 P.2d 338 (1971).[20]

These cases and statutes raise a possibility that the sacramental use of peyote by NAC members is protected by the Free Exercise Clause against the prohibitions of the CSA. Since there are no federal cases on point, however, we examine whether Congress could constitutionally prohibit sacramental peyote use by NAC members.

1. Is the NAC a "religion"?

The NAC is unquestionably a "religion" for First Amendment Free Exercise Clause purposes.[21] Although the NAC has no written scriptures or officially promulgated doctrine, its adherents share beliefs in powers, spirits (including God, the "great spirit"), and material incarnations.[22] Members of the NAC follow an ethical code, known as the "Peyote Road," which teaches brotherly love, care of the family, self-reliance, and avoidance of alcohol. NAC members attend all-night rituals known as "peyote meetings," which are solemn events governed by elaborate customs regarding the placement and purification of sacred objects, the order of ceremonial activities, and the like.

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[20] *See generally Whitehorn* v. *State: Peyote and Religious Freedom in Oklahoma,* 5 Am.I. L. Rev. 229 (1977); Note, *Native Americans and the Free Exercise Clause,* 28 Hastings L.J. 1509 (1977).

[21] Courts may not inquire into the truth or falsity of religious beliefs, *United States* v. *Ballard,* 322 U.S. 78 (1944), and are generally reluctant to decide a case on the ground that a given system of belief and action is not a "religion." *But see Yoder,* 406 U.S. at 215–16 ("[a]lthough a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests"); *International Society for Krishna Consciousness, Inc.* v. *Barber,* 650 F.2d 430; (worship of Krishna is religion); *Childs* v. *Duckworth,* 509 F. Supp. 1254 (N.D. Ind. 1981) ("Church of Satan, Fraternity of the Goat" probably not a religion); *Theriault* v. *Silber,* 453 F. Supp. 254 (W.D. Tex. 1978), *app. dismissed,* 579 F.2d 302 (5th Cir. 1978), *cert. denied,* 440 U.S. 917 (1979) ("Church of the New Song" not a religion); *United States* v. *Kuch,* 288 F. Supp. 439 (D.D.C. 1968) ("Neo-American Church" not a religion).

[22] For detailed descriptions of the NAC and its rituals, *see, e.g.,* D. Aberle, The Peyote Religion Among the Navajo (1966); W. La Barre, The Peyote Cult (1969); A. Marriott & C. Rachlin, Peyote (1971); V. Petrullo, The Diabolic Root (1934); J. Slotkin, The Peyote Religion (1956).

Given these well-known characteristics, it appears that the beliefs of NAC members satisfy a functional definition of religion: these beliefs occupy a place in the lives of NAC members parallel to that filled in the lives of others by more familiar religions.[23] Indeed, the NAC would qualify as a religion even under a more traditional definition. The NAC displays "a belief in a Supreme Being, a religious discipline, a ritual [and] tenets to guide one's daily existence." *Kuch*, 288 F. Supp. at 444. We conclude, therefore, that the NAC is a "religion" for purposes of the Free Exercise Clause.

2. Is peyote use grounded in the history of the NAC?

Courts have accorded great weight to the fact that a given system of belief and action is "not merely a personal preference but . . . has an institutional quality about it."[24] The institutional nature of belief encompasses the notions that a belief is shared with others and that the institution itself has endured for an appreciable period of time.[25] The NAC is an institutional religion in this sense. Its beliefs are shared by large numbers of Indians, including members of many different tribes. A reference to the religious use of peyote in Mexico appears in Spanish historical sources as early as 1560. *People* v. *Woody, supra*. Its doctrine and ritual developed among the Plains Indians sometime between 1870 and 1885; the essential elements of the ritual were well established when first observed by white men in 1897. The NAC was incorporated in Oklahoma in 1921 and is now an international organization with affiliated branches in other states and Canada. The fact that the NAC is an established religion with a significant history of sacramental peyote use is highly relevant to a determination whether the use of peyote by NAC members is protected by the Free Exercise Clause.

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[23] *See International Society for Krishna Consciousness, Inc.* v. *Barber,* 650 F.2d. at 440 (matter of ultimate concern to the individual, such that he would categorically disregard his self-interest in preference to transgressing these beliefs, is his religion); L. Tribe, American Constitutional Law, ch. 14 (1978); Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056 (1978). *Cf. United States* v. *Seeger*, 380 U.S. 163, 166 (1965) (interpreting statutory draft exemption); *Welsh* v. *United States,* 398 U.S. 33 (1970) (same); *Malnak* v. *Yogi*, 592 F.2d 197 (3d Cir. 1979) (Transcendental Meditation is a religion for Establishment Clause purposes).

[24] *Brown* v. *Dade Christian School Inc.*, 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978). *Accord, Yoder*, 406 U.S. at 216 (Thoreau's decision to move to Walden Pond was based on beliefs which were "philosophical and personal rather than religious, and such belief does not rise to the demands of the religion clauses.")

[25] *See, e.g., Yoder*, 406 U.S. at 235 ("history of three centuries as a religious sect and a long history as a successful and self-sufficient segment of American society").

3. Is peyote use central to the NAC?

Courts tend to require convincing governmental interests to justify burdening practices that are central to a given religion.[28] It seems indisputable that the use of peyote is central to the NAC in this sense. Peyote lies at the "theological heart" of the NAC. *People* v. *Woody, supra,* 61 Cal. 2d at 722, 40 Cal. Rptr. at 74, 394 P.2d at 818. Some NAC members believe in a divine "Peyote Spirit." All NAC members apparently believe that peyote is the material incarnation of spiritual power. Moreover, taking of peyote is the very cornerstone of the peyote meeting. It is not an exaggeration to say that use of peyote is the *sine qua non* of the NAC. *See, generally, id.;* sources cited in n.22, *supra.*

4. Is prohibiting religious peyote use the least restrictive means of accomplishing a compelling governmental purpose?

Because peyote use is firmly grounded in the NAC's history and central to its doctrine and ritual, it can be prohibited only if such a restriction is the least restrictive means of achieving a compelling governmental purpose. We can imagine three possible interests that the federal government might assert: (1) the interest in preventing harm to the NAC member resulting from peyote use in religious ceremonies; (2) the interest in preventing abuse of peyote by nonreligious persons who falsely claim to be religious; and (3) the interest in encouraging compliance with the law by other persons who do not claim the religious exemption, but who might doubt the public health justification if certain groups were exempted for whatever reason. We think it likely that these interests would be considered compelling in the context of *bona fide* sacramental use of peyote, and that a prohibition backed by civil and criminal sanctions is the least restrictive means of achieving the objective. As noted in note 18 *supra,* the majority of cases have recognized that the government has a compelling interest in prohibiting drug usage even by persons who take drugs for religious purposes. However, we lack sufficient facts to make a conclusive judgment in this regard.

Peyote is harmful to those who ingest it. This conclusion is implicit in the decision of Congress to list peyote as a Schedule I controlled substance in the CSA. Peyote is known to contain toxic alkaloids that can be lethal if taken in sufficient quantity, although there is no known lethal dosage of peyote itself. Mescaline, the major active ingredient in peyote, has been linked to harmful somatic or mutagenic effects. Use of peyote can cause permanent psychological damage in the form of personality disintegration, loss of concentration, memory failure, paranoia, passivity, and depression.[27] However, the government has consistently exempted peyote use by the NAC from the CSA. Its own action in creating and abiding by this exemption may point to the conclusion that its interest in prohibiting religious peyote use is not compelling. *Cf. Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981) (plurality opinion) (fact city exempted on-site commercial billboards from general prohibition on billboards undercut city's argument that off-site noncommercial billboards could be prohibited).

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[28] *See Yoder,* 406 U.S. at 210, 216, 218, 221, 235 (objection to formal education beyond eighth grade was "firmly grounded in . . . central religious concepts"; separation from worldly community was "fundamental," "basic," and "vital" to the faith); *Frank* v. *Alaska,* 604 P.2d 1068 (Alaska 1979) (reversing poaching conviction of Athabascan Indian who killed a moose for funeral feast; feast was "the most important institution in Athabascan life" and "food is the cornerstone of the ritual"); L. Tribe, *supra,* at §§ 14–11, pp. 859–65. *Compare Sequoyah* v. *TVA* 620 F.2d 1159 (6th Cir.), *cert. denied,* 449 U.S. 953 (1980) (refusing to enjoin construction of Tellico Dam at request of Cherokee Indians who alleged that impoundment would flood sacred tribal sites; not central to tribal religion).

The government has a compelling interest in enforcing the general prohibition on nonreligious peyote use. Thus, Congress could determine that an exemption for the NAC would create an intolerable risk that persons would use the cover of false adherence to religion in order to abuse the substance. Congress could also determine that an exemption would encourage disrespect for the law by seemingly undercutting the public health rationale for the prohibition of use by non-NAC members. Again, however, the strength of this argument would possibly be undercut by the government's longstanding exemption for the NAC. We are aware of no evidence that enforcement efforts have been significantly handicapped by the exemption.

In summary, we think it likely that Congress could, consistently with the Free Exercise Clause, prohibit even the religious use of peyote if it chose to do so, but we are unable to answer this question with assurance because we lack sufficient facts on which to make that judgment. For example, it would be useful to know whether peyote has the same type of harmful effects when used in religious ceremonies as when taken in clinical tests, and how NAC members compare with other Indians with respect to their overall physical and emotional health. Evidence of whether the peyote exemption has hampered enforcement efforts could also be relevant.

B. Establishment Clause

Because we are unable to conclude with confidence that the NAC has a free exercise right to use peyote for religious purposes, we now consider whether the exemption for the religious use of peyote contained in the CSA would offend the Establishment Clause if it is not required by the Free Exercise Clause. Under the Establishment Clause, government aid or preference to religion is constitutional only if it satisfies each part of a three-prong test: (1) it must have a secular purpose; (2) it must have a primary effect which neither aids nor inhibits religion; and (3) its application must not result in excessive entanglement of government with religion. *Stone* v. *Graham,* 449 U.S. 39 (1980) (*per curiam*); *Wolman* v. *Walter,* 433 U.S. 229, 236 (1977); *Meek* v. *Pittenger,* 421 U.S. 349, 358 (1975); *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U.S. 756, 773 (1973).

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[27] *See, generally,* 35 Fed. Reg. 14790-91 (1970). However, to our knowledge peyote has never been shown to be addictive.

The Supreme Court has on several occasions upheld against Establishment Clause challenges state actions which provided a special accommodation for religion. In *Zorach* v. *Clawson,* 343 U.S. 306 (1952), the Court upheld a program in which children were allowed to leave the public schools at a designated time in order to receive religious instruction elsewhere. The Court held that this accommodation to religious needs by secular authorities was not an unwarranted departure from the neutrality required by the Establishment Clause:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.

Id. at 313–14.

In *Walz* v. *Tax Commission of New York,* 397 U.S. 664 (1970), the Court upheld a state tax exemption for properties held by charitable, educational, and religious organizations, including properties used solely for religious worship. The Court observed that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. at 668. Although the state's obligation was one of neutrality, strict neutrality was not possible:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of these expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference . . . . The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.

397 U.S. at 669, 673. Stressing that the exemption applied to charitable and educational institutions as well as religious ones, the Court found that it was not enacted with a religious purpose. Moreover, enforcing a tax against religious property would involve the state in greater entan-

glement with religion than would granting an exemption. Finally, the Court stressed the long and uninterrupted history of property tax exemptions for churches in this country. As the Court stated with respect to this historical practice:

> It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something lightly to be cast aside.

397 U.S. at 678.[28]

Because they did not address whether the exemptions in question were required by the Free Exercise Clause, these cases do not expressly hold that the government may constitutionally accommodate religion by granting it special benefits not mandated by the Constitution. The failure of the Court to decide the cases on Free Exercise Clause grounds, however, may indicate that the released time program in *Zorach* or the tax exemption in *Walz* were not constitutionally required. Certainly, the Court's language quoted above from *Walz* implies that such an accommodation could be constitutional at least in some cases.[29]

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[28] *See also Sherbert*, 374 U.S. at 422, (Harlan, J., dissenting, joined by White, J.). These Justices dissented from the Court's conclusion that an exemption for Seventh-day Adventists was required by the Free Exercise Clause, but nevertheless contended that the state of its own volition could provide such an exemption without violating the Establishment Clause:

> [A]t least under the circumstances of this case it would be a permissible accommodation of religion for the State, if it *chose* to do so, to create an exception to its eligibility requirements for persons like the appellant. The constitutional obligation of "neutrality" . . . is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation.

Compare Widmar v. *Vincent*, 454 U.S. 263, 273 n.13 (1981) (Court declined to "reach the questions that would arise if State accommodation of Free Exercise and Free Speech rights should, in a particular case, conflict with the prohibitions of the Establishment Clause"); *id.* at 282 (White, J., dissenting):

> I have long argued that Establishment Clause limits on state action which incidentally aids religion are not as strict as the Court has held. The step from the permissible to the necessary, however, is a long one. In my view, just as there is room under the Religion Clauses for state policies that may have some beneficial effect on religion, there is also room for state policies that may incidentally burden religion. In other words, I believe the States to be a good deal freer to formulate policies that affect religion in divergent ways than does the majority.

[29] The lower federal courts have addressed a closely analogous problem in the context of challenges to § 701(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j), which requires employers reasonably to accommodate the religious beliefs and practices of their employees. The courts have split on whether the reasonable accommodation provision violates the Establishment Clause. Courts in the Fourth, Sixth, Seventh, and Ninth Circuits have upheld § 701(j). *Jordan* v. *North Carolina Nat'l Bank*, 399 F. Supp. 172 (W.D.N.C. 1975), *rev'd on other grounds*, 565 F.2d 72 (4th Cir. 1977); *Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided Court*, 429 U.S. 65 (1976); *Nottelson* v. *Smith Steel Workers D.A.L.V. 19806*, 643 F.2d 445 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); *Tooley* v. *Martin-Marietta Corp.* 648 F.2d 1239 (9th Cir. 1981). Courts in the Third and Fifth Circuits have struck it down. *Gavin* v. *People Natural Gas Co.*, 464 F. Supp. 622 (W.D. Pa. 1979); *Isaac* v. *Butler's Shoe Corp.*, 511 F. Supp. 108 (N.D. Ga. 1980). Commentators are likewise divided: *e.g.*, Wheeler, *Establishment Clause Neutrality and the Reasonable Accommodation Requirement*, 4 Hastings L.Q. 901 (1977) (valid); Note, *Can the Government Require Accommodation of Religion at the Private Job-Site?*, 62 Va. L. Rev. 237 (1976) (invalid). The Supreme Court has failed to resolve the

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While the lack of a clear holding in these cases cautions against any firm statement of the legal principles in this area, it is our opinion that the government may, consistently with the Establishment Clause, take actions necessary to avoid substantial interference with religious practices or beliefs, even if such actions are not required by the Free Exercise Clause, provided that the actions do not impose hardship on others or amount to government sponsorship or support of religion. Such a rule would comport with the practical necessities of government. The Framers of the Constitution could not have intended that there be precisely one and only one correct course of action between committing a Free Exercise Clause violation, on the one hand, and an Establishment Clause violation, on the other. The government must enjoy a zone of permissible accommodation if it is to function at all. *See Walz*, 397 U.S. at 673. *Cf.* Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 197 (1976).

Applying this principle to the problem at hand, we conclude that the CSA's exemption for the *bona fide* religious use of peyote passes muster under the Establishment Clause. As noted above, this exemption might be required by the Free Exercise Clause, although we believe it more likely that the exemption is not constitutionally mandated. Even if not required by the Free Exercise Clause, such an exemption appears necessary to avoid substantial interference with the religious practices and beliefs of the NAC. The exemption would not impose affirmative burdens on any person, believer or nonbeliever, nor would it amount to government sponsorship or support of religion.

The exemption should not be viewed as having a religious purpose: your agency's goal is not specifically to further the interests of the NAC or any other religion, but, rather, to meet its possible obligations under the Free Exercise Clause and, more generally, to further free exercise values by removing affirmative barriers to religious practices. Nor does the exemption have a primarily religious effect: encouraging freedom of religious belief and practice evinces only a "benevolent neutrality" in matters of religion. *Walz*, 397 U.S. at 669. In exempting sacramental peyote use based on the importance and history of such use, the government does not lend its imprimatur to any particular religion or religion in general, nor does it encourage belief in the tenets of any religion. There is no "sponsorship, financial support, [or] active involvement of the sovereign in religious activity." *Id.* at 668. Finally,

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issue, although it has evinced interest in it. In *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), the circuit court considered EEOC regulations which were the predecessor of §701(j); the Supreme Court affirmed by an equally divided vote, 402 U.S. 689 (1971). The Supreme Court also affirmed *Cummins* v. *Parker Seal Co.*, *supra*, by an equally divided vote, 429 U.S. 65 (1976) (Stevens, J., not participating). In *TWA* v. *Hardison*, 432 U.S. 63 (1977), the Court did not reach the issue since it held that no accommodation was reasonably possible

See also Jaggard v. *Commissioner*, 582 F.2d 1189 (8th Cir. 1978), *cert. denied*, 440 U.S. 913 (1979) (upholding social security tax exemption for persons with religious scruples against accepting benefits of insurance schemes).

an exemption for the sacramental use of peyote would probably not be invalidated as entailing an impermissible government entanglement in religious matters. Reliance on history as an important probative factor should reduce the entanglement that might otherwise accompany a governmental investigation of whether a system of belief and action is a religion, whether the adherent is sincere, and whether peyote use is central to the religion.

We conclude, therefore, that the Establishment Clause is not violated by the statutory exemption for the religious use of peyote by the NAC and other *bona fide* peyote-using religions in which the actual use of peyote is central to established religious beliefs, practices, dogmas, or rituals.

III. Availability of Exemption

Finally, you have inquired as to the constitutionality of exempting American Indian peyotists to the exclusion of other religious users of peyote. Such an exemption would require statutory amendment, since, as we concluded in Part I, the current statutory exemption applies to the NAC and to other religions whose use of peyote is central to established religious beliefs, practices, dogmas, or rituals. We conclude that an exemption limited to American Indians might well be unconstitutional.

It is well accepted that the Establishment Clause prohibits a government from "prefer[ring] one religion over another." *Everson*, 330 U.S. at 15. *See Cruz* v. *Beto*, 405 U.S. 319 (1972) (prison must provide reasonable opportunity for Buddhist to pursue faith comparable to that provided prisoners of other religions); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953) (Jehovah's Witness meeting may not be barred in public park open to other religious services).[30] Under accepted principles, therefore, an exemption which discriminates among otherwise equally situated religions violates the Establishment Clause.

We do not believe that any different conclusion is required when, as here, the "preferred" religion is comprised of American Indians. It is true that Indians are treated differently for some purposes under our law. Special rules of construction govern judicial interpretation of statutes and treaties involving Indians. Indians may be given preference on the basis of tribal membership without triggering heightened equal protection scrutiny. *Morton* v. *Mancarci*, 417 U.S. 535 (1974). Indian tribes may establish a religion on the reservation without contravening constitutional or statutory prohibitions. *See Talton* v. *Mayes*, 163 U.S. 376 (1896); Indian Civil Rights Act, 25 U.S.C. § 1302. Congress has shown special concern for Indian religion by enacting the Indian Religious Freedom Act of 1978, Pub. L. No. 95-341.

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[30] *See also Valente* v. *Larson*, 637 F.2d 562 (8th Cir. 1981) (exemption from solicitation ordinance which applied unequally to different religious organizations held to violate Establishment Clause), *cert. granted*, 49 U.S.L.W. 3890 (1981) [*aff'd* 456 U.S. 228 (1982)].

However, the special treatment of Indians under our law does not stem from the unique features of Indian religion or culture. With respect to these matters, Indians stand on no different footing than do other minorities in our pluralistic society. Rather, the special treatment of Indians is grounded in their unique status as political entities, formerly sovereign nations preexisting the Constitution, which still retain a measure of inherent sovereignty over their peoples unless divested by federal statute or by necessary implication of their dependent status. *See United States* v. *Wheeler*, 435 U.S. 313 (1978).

An exemption for Indian religious use of peyote would not be grounded in the unique political status of Indians. Instead, the exemption would be based on the special culture and religion of the Indians. In this respect, Indian religion cannot be treated differently than other religions similarly situated without violation of the Establishment Clause.[31]

Our conclusion in this respect is consistent with the relevant court decisions. *In re Grady*, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964), was a habeas corpus petition brought by a self-styled "peyote preacher" who had been convicted of illegal possession of peyote. The California Supreme Court granted the writ and remanded for a hearing on the authority of *People* v. *Woody, supra*. The court apparently believed it irrelevant whether the petitioner was an Indian or a member of the NAC. *Kennedy* v. *Bureau of Narcotics and Dangerous Drugs, supra*, 459 F.2d 415, was a petition for review of a refusal by the predecessor of your agency to amend the peyote exemption to include a group styling itself as the "Church of the Awakening." The court held that an exemption restricted to members of the NAC "creates an arbitrary classification that cannot withstand substantive due process attack." *Id.* at 417.[32]

IV. Conclusion

The possible necessity of extending the exemption to other non-Indian groups may entail some additional administrative burdens for your agency. As a practical matter, however, we believe that no other groups of which we are aware could establish their entitlement to the exemption. We believe that your agency would be fully justified in adopting procedures or standards designed to minimize those burdens wherever possible. Such procedures or standards would probably be supported by one or more of three compelling governmental interests: (1) the interest in avoiding excessive administrative burdens; (2) the interest in preventing abuse of peyote by persons falsely claiming a religious exemption; and (3) the interest in avoiding unnecessary entanglement with religion.

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[31] The Department of Justice has expressed similar views in another context. *See generally* Statement of Larry L. Simms on S.J. Res. 102 before the Senate Select Committee on Indian Affairs, February 27, 1978 (noting that congressional preference for Indian over non-Indian religions could raise Establishment Clause problems).

[32] However, the court declined to grant relief: since the Church of the Awakening had sought to include only itself within the exemption while leaving other *bona fide* religions nonexempt, the requested exemption was subject to the same constitutional infirmity as was an exemption limited to the NAC.

Your agency could require that any group wishing to qualify for the exemption bring a petition for inclusion. If such a petition is brought, your agency could: (1) require that the petitioner be a member of a *bona fide* peyote-using religion in which the actual use of peytoe is central to established religious beliefs, practices, dogmas, or rituals; and (2) apply a rebuttable presumption that the exemption is not available, under the foregoing standard, unless the petitioner can allege and establish a significant history of religious use of peyote. Such a presumption is justifiable as an objective means of determining that the petitioner's beliefs are *bona fide* and religious. While a purely personal and idiosyncratic religion may be theoretically possible, *cf. United States* v. *Seeger,* 380 U.S. 163 (1965), the Supreme Court has stressed the importance of a recognized and established organization, with a significant history of the religious practice in question, to a determination that given beliefs and practices are religious. A requirement that the petitioner be a member of an established organization with a significant history of peyote use would serve to relieve the administrative burden on your agency. Moreover, it would deter false petitions by individuals who wish to abuse peyote for nonreligious purposes. Finally, this type of requirement may be necessary to prevent undue entanglement by your agency in religious matters.

Our research has identified no religious organizations, other than the NAC, which would qualify for the exemption under these or similar procedural and substantive requirements. It seems unlikely, therefore, that in practice the peyote exemption need be expanded beyond an exemption for the NAC. If, however, a group does appear which can establish that it is a *bona fide* religion in which the actual use of peyote is central to established religious beliefs, practices, dogmas, or rituals, your agency is obligated to accord it the exemption under the current statutory scheme.

THEODORE B. OLSON
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Office of Legal Counsel

Use of Potatoes to Block the Maine-Canada Border

A number of federal statutes might justify federal intervention in the event Maine potato farmers seek to block highways at border crossings in northeastern Maine to prevent the importation of potatoes from Canada, or attack federal officers or property at the United States-Canada border. Federal intervention might take the form of direct law enforcement activity by federal executive officials, or a judicial injunction against persons seeking to obstruct the passage of interstate commerce and the mails.

In extreme situations, the President may call out the National Guard or the Army to put down rebellions in states that threaten the enforcement of federal law.

Federal law enforcement officers have no special authority to make arrests for violations of state law, and they can act in this regard only as private citizens.

The Attorney General is the chief civilian officer in charge of coordinating all federal governmental activities relating to civil disturbances. Generally, because the statutory and constitutional scheme of our government leaves the protection of life and property and the maintenance of public order largely to state and local governments, the Attorney General has pursued a policy against commitment of federal forces until advised by the appropriate state officials that the situation is beyond their control.

December 23, 1981

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

In response to pressure from Maine potato farmers threatened by competition from Canada, Maine's Department of Agriculture has issued regulations which require inspectors, inspection fees, and permits for all potatoes entering the state. Because the regulations appear on their face to offend the Commerce Clause of the Constitution, the Justice Department sued in federal court to have them struck down. *United States* v. *Maine,* No. 81-0458 P (D. Me., filed Dec. 7, 1981). On Tuesday, December 8, Judge Edward T. Gignoux, Chief Judge of the United States District Court for the District of Maine, denied the federal government's request for a temporary restraining order. Following a hearing on December 21 and 22, Judge Gignoux granted the motion for a preliminary injunction yesterday afternoon. Unless the state voluntarily withdraws the regulations within the next few days, the judge has said that he will enter a final injunction by next week. The preliminary injunction is enforceable against the named defendants—the State of Maine, the Governor, his Attorney General, and the State's Department of Agriculture—and their agents. Fed. R. Civ. P. 65(d).

This responds to your request for information on the options available to the U.S. Attorney General and the President should Maine farmers, individuals not covered by the injunction, attempt to thwart the effect of the injunction by obstructing highways on the Maine-Canada border.

I. Scenario

Assuming the farmers follow the same pattern as their last demonstration in 1980, they will use potatoes, trucks, and other heavy equipment to block the highways at border crossings in northeastern Maine.[1] In 1980, when nine border stations over a 100-mile stretch were involved, two arrests were made on the first day of the demonstration by the state police.[2] Border traffic was rerouted to other crossings. The protest ended after two days when then Vice President Mondale promised to set up a task force to study the problem. We will assume for the purposes of this memorandum that state officials are unable or unwilling to intervene to end the protest.

If the farmers stage a low-key demonstration—merely dumping the potatoes and milling about—there may be no overt threat to either federal officers or to federal land or property at the border crossings themselves. In 1980, some potatoes apparently did roll under the canopies of the Customs Service sheds, but they were removed without incident. The demonstration could escalate, however, to the point where a mob threatens harm to Border Patrol or Customs Service agents and federal facilities. In 1980, for example, a state police officer inflicted a serious head wound on a farmer.[3]

II. Potentially Applicable Statutes

Identifying federal statutes in this context is difficult. The statutory and constitutional scheme of our government leaves the protection of life and property and the maintenance of public order largely to state and local governments. Only when civil disorder grows beyond a state's ability to control or threatens federal rights does the federal government generally intervene. The following statutes may become applicable, depending upon what course the farmers and state officials take.

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[1] N.Y. Times, March 28, 1980, at 16, col. 3; *id.* March 29, 1980, at 6, col. 5; *id.*, March 30, 1980, at 26, col. 6. Apparently, only the lane carrying traffic into the United States was blocked. Telephone conversation with William D. Slyne, Branch Chief, Special Operations, United States Customs Service, (566-2957) (December 10, 1981).

[2] N.Y. Times, March 29, 1980, at 6, col. 6. Governor Brennan was quoted as saying he would make every effort to clear the roads, although he was reluctant to use violence. *Id.*

[3] Slyne conversation, *supra* n.1.

1. *Obstruction of highways:* Highways in the United States are owned by the states, even though often built in large part by federal funds, and are, therefore, generally under state jurisdiction.[4] Blockage of a state highway is not usally a matter of federal concern. However, federal law prohibits interference with the right to travel. 18 U.S.C. § 241,[5] and 42 U.S.C. § 1985(3).[6] Private conspiracies to harm travelers and obstruct their passage have been prosecuted under these acts. *See Griffin* v. *Breckenridge,* 403 U.S. 88 (1971); *United States* v. *Guest,* 383 U.S. 745, 757–60 (1966). In 1974, the United States obtained indictments of persons participating in a coordinated truckers' strike that was intended to interfere with the interstate travel rights of non-striking truckers.[7] Federal law also prohibits, during a civil disturbance, the injury, intimidation of, or interference with anyone engaged in interstate commerce. 18 U.S.C. § 245(b)(3).[8]

It is also possible that the potato farmers might fall afoul of the Sherman Act's antitrust provisions,[9] since they are acting in concert in an effort to restrain trade.

If an unruly mob attacks Canadian drivers, we could consider initiating prosecutions under 18 U.S.C. § 245(b)(2)(E), which makes it unlawful to injure, intimidate, or interfere with "any person because of his . . . national origin and because he is or has been . . . traveling in or using any facility of interstate commerce." Likewise, the use of extortion to obtain compliance from other farmers or Canadians might violate 18 U.S.C. § 1951(a), (b)(2). *See also* 18 U.S.C. § 1952(a)(2), (b)(2).

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[4] Telephone conversation with L. Harold Akens, Jr., Special Assistant to the Chief Counsel, Federal Highway Administration, December 8, 1981.

[5] If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured . . .

18 U.S.C. § 241.

[6]
> If two or more persons in any State or Territory conspire or go in disguise on the highway or the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . 42 U.S.C. § 1985(3)

[7] Letter from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, to the Honorable John D. Dingell, U.S. House of Representatives (April 16, 1974).

> [8] Whoever, whether or not acting under color of state law, by force or threat of force willfully injures, intimidates or interferes with . . . during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities or services which it sells . . . .

18 U.S.C. § 245(b)(3).

[9] Every . . . conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.
15 U.S.C. § 1.

Because of the burden that obstructions on the highway place on interstate commerce, the United States can either go into court to obtain an injunction against any impediment to the passage of interstate or foreign commerce and to delivery of the mails, *In re Debs*, 158 U.S. 564, 581–83 (1895), or can choose to use force. *Id. Debs* involved a major strike against the Pullman Co. that attempted—often, it was alleged, by violence—to shut down several interstate railroads. The United States, noting that mail, foodstuffs, fuel, and passengers were all carried by the railroads, obtained an injunction against "any" person who attempted to interfere in any manner with the named railroads. *Id.* at 570. When Eugene Debs, jailed for contempt of this order, sued for a writ of habeas corpus, the Supreme Court explicitly chose, *id.* at 600, to rest its denial on the broad ground of the federal government's inherent authority to enforce its jurisdiction "over every foot of soil within its territory and [to act] directly upon each citizen . . . ." *Id.* at 599. "[I]n the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail . . . ." *Id.* There is a statute explicitly prohibiting obstruction of the mail. 18 U.S.C. § 1701.[10]

2. *Attack on federal officers or property*: Several statutes protect federal officers and property. During a civil disorder—a public disturbance by more than three people involving acts of violence, 18 U.S.C. § 232(1)—it is a felony to impede a law enforcement officer in his official duties. 18 U.S.C. § 231(a)(3).[11] Assault on or resistance to customs and immigration officers is specifically forbidden, 18 U.S.C. § 111,[12] as are rebellions against the authority of the United States, 18 U.S.C. § 2383,[13] and

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[10] Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined not more than $100 or imprisoned not more than six months, or both.

18 U.S.C. § 1701. Foreign mail is considered mail of the United States. 18 U.S.C. § 1692. Note that the Postal Service is now an independent establishment with authority to sue in its own name, 39 U.S.C. § 401(1) and any suit by the Attorney General might well require its concurrence. 39 U.S.C. § 409(d).

[11] (3) Whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 231(a)(3).

[12] Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

18 U.S.C. § 111. Section 1114 is a list of covered officials.

[13] Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.

18 U.S.C. § 2383. *See also* 18 U.S.C. § 2384 (conspiracy).

[14] Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, shall be punished . . . .

18 U.S.C. § 1362. *See also* 40 U.S.C. §§ 318–318d (security provided by GSA).

willful injury to United States property, 18 U.S.C. § 1361,[14] or certain kinds of communications equipment, 18 U.S.C. § 1362. Arrests may be made by the Federal Bureau of Investigation (FBI), 18 U.S.C. § 3052, United States Marshals, 18 U.S.C. § 3053, and Secret Service agents, 18 U.S.C. § 3056. (Note that Immigration and Naturalization Service (INS) agents may only arrest for violations of the immigration laws, 8 U.S.C. §§ 1324(b), 1357, and customs officers are generally limited to arrests for violations of the customs laws, unless armed with a warrant. 19 U.S.C. § 1581(f); 26 U.S.C. § 7607(2)).

3. *Presidential authority:* In extreme situations, the President may call out the National Guard or the Army to put down rebellions that threaten enforcement of federal law, 10 U.S.C. § 332,[15] and to protect against deprivations of constitutional rights caused by failure to enforce state or federal law. 18 U.S.C. § 333.[16] The application of these two statutes is explored fully in "The Use of Military Force Under Federal Law to Deal with Civil Disorders and Domestic Violence" (1980), a Department of Justice manual based in large part on the work of former OLC Deputy Assistant Attorney General Lawton.

4. *Enforcement of state law:* "We think it clear that the FBI has no *federal* authority to take action with respect to violations of state law, even in exigent circumstances." Memorandum for the Director of the FBI from Assistant Attorney General Harmon, February 24, 1978, at 1. After noting that several courts have agreed with this view, the opinion states that "if no federal statute authorizes arrests in a particular situation, state law governs." *Id.* at 2. The issue, therefore, becomes whether federal law enforcement officers are considered officers under Maine law or, if not, what arrest authority Maine grants private citizens.[17]

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[15] Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

10 U.S.C. § 332

[16] The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

> (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or
>
> (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

10 U.S.C. § 333

[17] *See United States* v. *Carter,* 523 F.2d 476 (8th Cir. 1975); *Ward* v. *United States,* 316 F.2d 113 (9th Cir. 1963), *cert. denied,* 375 U.S. 862 (1963). The FBI has, on prior occasions, expressed policy objections to being used to enforce state laws. Memorandum for the Attorney General from Assistant Attorney General White, September 17, 1957.

Law enforcement officers[18] in Maine may make a warrantless arrest for violations of a number of potentially applicable state statutes: riot, Me. Rev. Stat. Ann., tit. 17-A, § 503 (Supp. 1980); unlawful assembly, *id.* § 504; obstruction of public ways, *id.* § 505; assault, *id.* § 207; criminal threatening, *id.* § 209; reckless conduct, *id.* § 211; obstruction of government administration, *id.* § 751; and criminal mischief, *id.* § 806. *See id.* § 15(1)(A)(5). Assuming, despite the broad language, that the definition of a Maine "law enforcement officer" does not cover federal agents, all federal officials, including INS and Customs officers, can act as private citizens. Maine law permits private citizens to make a warrantless arrest for any of the listed crimes that take place in their presence *except* unlawful assembly and obstruction of the public ways. *Id.* § 16(2)(A). The Memorandum for the Director of the FBI, *supra,* discusses the potential liability of the agents and the United States government if the state law is incorrectly applied. Memorandum, at 6-9.

III. Conclusion

The Attorney General is the chief civilian officer in charge of coordinating all federal governmental activities relating to civil disturbances.[19] Depending upon the seriousness of the disturbance, he may wish to consult with the Border Patrol, Customs Service (Department of Commerce), the State Department, the United States Trade Representative (Department of Agriculture), and the local United States Attorney, as well as state officials. Memoranda written during prior incidents reveal a policy against commitment of federal forces until the governor of the state has used all available local resources and is willing to advise that the situation is beyond state control.[20] If it is decided, as a policy matter, that the federal government should intervene, we should probably explore in more depth the possibility of obtaining an injunction against any persons who are obstructing the passage of interstate commerce and the mails.

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[18] This is "any person who by virtue of his public office employment is vested by law with a duty to maintain public order . . . . or to make arrests for crimes . . . ." Me. Rev. Stat. Ann., tit. 17-A, § 2(17). Maine completely revised its criminal code within the last two years and there are no cases interpreting this section.

[19] Interdepartmental Action Plan for Civil Disturbances at 2 (1969).

[20] *See, e.g.,* Memorandum for the Attorney General from Assistant Attorney General Harmon, September 9, 1977 (coal strike in West Virginia).

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Payment of Travel Costs to Witnesses During a Period of Lapsed Appropriations

Where witnesses have been ordered to appear in court during a lapse in the Department of Justice's appropriation, and lack the financial resources necessary to return home, there exists a sufficient likelihood that the witnesses' safety would be compromised by not providing them the means to return home to warrant a cash disbursement for that purpose under the Antideficiency Act, 31 U.S.C. § 665(b).

Under the interpretation of the Antideficiency Act in the Attorney General's opinion of January 16, 1981, emergency expenditures may be made during a lapse in appropriations if they are necessary to secure the safety of human life or the protection of property. The totality of circumstances must be examined and evaluated in each case to determine whether such emergency expenditures are permitted.

December 23, 1981

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, JUSTICE MANAGEMENT DIVISION

The Justice Management Division (JMD) asked this Office to advise whether disbursement of travel costs incurred by witnesses in a given set of circumstances during a lapse in appropriations would be precluded by the Antideficiency Act, 31 U.S.C. § 665.[1] Specifically, JMD asked whether disbursement of costs incurred by a witness traveling to and from the courthouse, pursuant to 28 U.S.C. § 1821(c)(Supp. II 1978),[2] would violate the Act when the witness' appearance was directed by a court order issued prior to the lapse in appropriations.

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[1] The Antideficiency Act, 31 U.S.C. § 665, provides in pertinent part:

> (a) Expenditures or contract obligations in excess of funds prohibited
>
> No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.
>
> (b) Voluntary service forbidden
>
> No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

[2] 28 U.S.C. § 1821(c) provides in pertinent part:

> (1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance.
>
> (2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle.

The Antideficiency Act prohibits the United States from making expenditures or incurring contract obligations in excess of the amount of funds appropriated, "unless such contract or obligation is authorized by law." Attorney General Civiletti rendered an opinion on January 16, 1981, strictly construing the spending prohibitions contained in the Act unless such expenditures were authorized by law. *See* Opinion of the Attorney General, January 16, 1981.* *See also* Opinion of the Attorney General, April 25, 1980, 43 Op. Att'y Gen._[4 Op. O.L.C. 16 (1980)]. Included within the expenditures permitted under the Act during a lapse in appropriations pursuant to these two opinions are those which involve the orderly termination of agency operations, and emergency expenditures which are necessary to secure the safety of human life or the protection of property. The Attorney General did not list specifically the obligations for which expenditures could be made after a lapse in appropriations; rather, he set forth "general principles" in his opinion letter, "[t]he precise application [of which] must, in each case, be determined in light of all circumstances surrounding a particular lapse in appropriations." Letter, January 16, 1981, *supra* at 3.

The Attorney General construed the "safety of human life [and] protection of property" clause of § 665(b) to require:

> [first,] some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property [and second] some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

Id. at 11. Application of these principles to the situation described in JMD's request[3] leads to the conclusion that a cash disbursement in an amount sufficient to permit the witnesses to return home, or, if travel is impracticable at that time, to secure overnight accommodations and meals, would be permitted under the Act.

Expenditures authorized as necessary to the "orderly termination of agency operations" may, in circumstances of extraordinary hardship, include the payment of obligations which arose prior to the lapse in appropriations. In the circumstances described by JMD, it seems clear that the obligation to reimburse the witnesses for *round trip* costs arose at the time of their departure from home, and that, having induced

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*Note: The January 16, 1981, Opinion of the Attorney General, *Authority for the Continuance of Government Functioning During a Temporary Lapse in Appropriations,* appears in this volume at p. 1 *supra.* Ed.

[3] The particular situation described by JMD involved several witnesses who were ordered to appear in court on the morning of Monday, November 23, 1981. Appropriations authority lapsed at midnight, Friday, November 20, 1981, and continued through the late afternoon of November 23. The witnesses had not been notified prior to their arrival at the courthouse that the court would not be convened on Monday morning, had traveled a distance of some length, and had no money to return home.

their travel by court order, part of the orderly termination of the court's business involved making funds available for their return home or lodging in safe accommodations, if return that day is impractical. We do not mean to suggest that the "orderly termination of agency operations" exception may be applied to authorize payment of all witness fees or other obligations which arose prior to the appropriations hiatus—rather the totality of circumstances must be examined and evaluated in each case.

While it is clear that witnesses who are directed by court order to appear in federal courts during a lapse in appropriations have a valid claim against the United States for travel costs incurred in complying with the court's order, ordinarily, such disbursements may not be made until the Department's funding has resumed. *See New York Airways, Inc.* v. *United States,* 369 F.2d 743 (Ct. Cl. 1966). However, the particular witnesses described in JMD's request present a "hardship" case that, in our judgment, meets the requisite standard for emergency expenditures under § 665(b) set forth in Attorney General Civiletti's January 16, 1981, opinion. Where witnesses have been ordered to appear in court during a lapse in the Department of Justice's appropriation, and lack financial resources necessary to return home, we believe that there exists a sufficiently reasonable likelihood that the witnesses' safety would be compromised by not providing them the means to return home to warrant a cash disbursement for that purpose.

Because expenditures authorized under the Antideficiency Act are to be narrowly construed, our opinion is confined to the particular facts set forth in this case.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Executive Power with Regard to the Libyan Situation

[The following memorandum reviews the significant statutory authorities available to the President and other executive officials in dealing with a foreign policy crisis.]

December 23, 1981

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL, THE DEPUTY ATTORNEY GENERAL, AND THE ASSOCIATE ATTORNEY GENERAL

To assist you in deliberations regarding Libya, we are providing a general memorandum concerning statutes likely to be significant.

A. The International Emergency Economic Powers Act

The President has wide-ranging power to regulate property and transactions in which a foreign country has an interest under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1706 (Supp. III 1979), enacted in 1977. IEEPA was used during the Iran hostage crisis: (1) to block Iranian government property in this country; (2) to limit exports and imports to Iran; (3) to restrict transactions with any foreign person or entity relating to travel to Iran; and (4) to make the required transfers of funds in connection with the agreement ending the hostage crisis. *Dames & Moore* v. *Reagan*, 453 U.S. 654 (1981); *e.g.*, Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979); Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980); Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (1980). It continues to be used today to implement various financial aspects of the settlement with Iran.

The IEEPA provides broad powers to the President in the event of any:

> unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

50 U.S.C. § 1701. If such an emergency is declared, the President may:

under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. § 1702(a)(1). Under these provisions, once the President declares a national emergency, he may control all foreign assets subject to the jurisdiction of the United States, regulate or prohibit movements of foreign or domestic currency or credit in and out of the country, and prohibit all transactions involving any property in which the foreign country or any national thereof has an interest.

If a decision is made to invoke IEEPA, certain steps must be taken immediately under that Act and the National Emergencies Act, 50 U.S.C. §§ 1601–1651. The latter Act confers no separate authority, but imposes procedural requirements.

(1) *Consultation with Congress;* The President, "in every possible instance," shall consult with Congress *before* exercising authorities under the IEEPA. 50 U.S.C. § 1703(a). There is no formal procedure for this. It has usually been done with only a small group of congressional leaders.

(2) *Declaration of a national emergency:* A proclamation of national emergency is necessary to use the powers available under IEEPA. 50 U.S.C. § 1701. The President is authorized to declare an emergency pursuant to the National Emergencies Act. 50 U.S.C. § 1621. For purposes of IEEPA, such an emergency may be declared with respect to any unusual and extraordinary threat to the national security, foreign policy, or economy of the United States which has its source outside this country. 50 U.S.C. § 1701. This language was left broad to provide necessary discretion. H.R. Rep. No. 459, 95th Cong., 1st Sess. 10 (1977).

A presidential declaration of emergency under IEEPA can be short and to the point. In the Iran crisis, the President stated: "I find that the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States and hereby declare a national emergency to deal with that threat." Exec. Order No. 12,170, *supra*, 44 Fed. Reg. 65,729. The courts will not review a determination so peculiarly within the province of the President. *See* 42 Op. Att'y Gen. at 370.

Under the Act, Congress is authorized to terminate a declared emergency through adoption of a concurrent resolution. 50 U.S.C. § 1706(b) (Supp. III 1979). It is our position that a concurrent resolution, because it would not be subject to the President's veto, would be constitutionally insufficient to terminate a declared emergency.

(3) *Designation of Act:* The National Emergencies Act declares that in the same proclamation or by contemporaneous or subsequent executive orders, the President must designate the particular emergency statute he wishes to invoke, *e.g.*, IEEPA. The 1979 Iranian blocking order and emergency declaration appeared in the same document. Exec. Order No. 12,170, *supra*, 44 Fed. Reg. 65,729.

(4) *Delegation:* Since IEEPA vests powers directly in the President, an executive order should delegate power to an appropriate official. 3 U.S.C. § 301. This could be the Secretary of the Treasury, who already administers similar programs. The President could declare a sanction in general terms and delegate to an appropriate official the powers to administer the sanction and enforce the Act. This was done with the 1979 Iranian blocking order; doing so would avoid any enforcement gap between the issuance of the proclamation and implementation of the regulations by Treasury.

(5) *Publication and transmittal to Congress:* The National Emergencies Act requires that the emergency proclamation be immediately transmitted to Congress and published in the Federal Register. 50 U.S.C. § 1621.

(6) *Report to Congress:* Following the issuance of the order, the President shall "immediately" transmit a report to the Congress specifying:

> (1) the circumstances which necessitate such exercise of authority;
>
> (2) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;
>
> (3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;

> (4) why the President believes such actions are necessary to deal with those circumstances; and
>
> (5) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

50 U.S.C. § 1703(b).

The legislative history indicates that this requirement was not to impede use of emergency power. The House report notes:

> Nothing in this section should be construed as requiring submission of a report as a precondition of taking action where circumstances require prompt action prior to or simultaneously with submission of a report.

H.R. Rep. No. 459, *supra*, at 16.

The Department of State is currently drafting appropriate report language which, once approved by concerned agencies, can be incorporated immediately into final documents.

IEEPA provides for prison sentences of up to 10 years and fines up to $50,000. Officers, directors, and agents of corporations are specifically covered by this provision if they knowingly participate in violations. Civil fines of up to $10,000 may also be imposed.

B. The Trading With the Enemy Act

The Trading with the Enemy Act, as amended in 1977, is available only during a war. 50 U.S.C. App. § 5(b) (Supp. III 1979). The key language of IEEPA quoted above (describing the powers available to the President) was based on the Trading with the Enemy Act, which retains comparable provisions. In addition, broader powers are available under the Trading with the Enemy Act, including the authority to vest enemy property (a process by which the government seizes and takes title to it) and to control wholly domestic transactions. 50 U.S.C. App. § 5(b).

C. Passport Restrictions

The Passport Act, as amended in 1978, deals with the power of the Secretary of State to restrict the use of passports. It provides:

> Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers.

22 U.S.C. § 211a (Supp. III 1979).

The amendment followed a Supreme Court decision holding that the President had authority to refuse to validate passports for travel to Cuba. *Zemel* v. *Rusk*, 381 U.S. 1 (1965). The Senate committee that added the amendment said that it intended to make "the freedom-of-travel principle . . . a matter of law." S. Rep. No. 842, 95th Cong., 2d Sess. 14 (1978). Nevertheless, the Supreme Court has recently confirmed that the President has broad power over the issuance and revocation of passports. *Haig* v. *Agee*, 453 U.S. 280 (1981).

The President's power has been delegated to the Secretary of State pursuant to Executive Order No. 11,295, 31 Fed. Reg. 10,603 (1966). On December 9, 1981, Acting Secretary of State Clark restricted the use of United States passports for travel in Libya by placing a notice to that effect in the Federal Register. 46 Fed. Reg. 60,712 (1981). The notice said that the action was required by the unsettled state of relations with Libya, and the increased threat of hostile acts against Americans. It noted that the American Embassy in Libya remains closed and that the U.S. government is not in a position to provide diplomatic protection or consular assistance to Americans in Libya. Therefore there was an imminent danger to the physical safety of Americans travelling to or present in Libya.

In April, 1980, shortly before the rescue mission to Iran, President Carter authorized the restriction of the use of passports for travel to Iran. Exec. Order No. 12,211, *supra*, 45 Fed. Reg. 26,685 (1980). This restriction was lifted at the time of the hostage release agreement in January, 1981. The order did not prove to be successful in deterring some Americans from traveling to Iran. On May 31, 1980, while the hostages were being held and the travel restriction was in effect, former Attorney General Ramsey Clark led a group of ten U.S. citizens to Iran to participate in an international conference. The Attorney General decided earlier this year not to litigate the question of whether this group had violated various federal laws.

The Passport Act itself provides no penalty for its violation. It is a crime "to use any passport in violation of the conditions or restrictions therein contained . . . ." 18 U.S.C. § 1544. It is, however, difficult to enforce this law. It appears that, in order to have a successful prosecution, the government must prove that a U.S. passport that was geographically restricted was used to enter the country to which travel was restricted. Persons traveling to geographically restricted areas generally work out arrangements with the country of destination to admit them without presentation of the passport; if the passport is not used, no violation occurs. Even if the passport is used, evidence on this point is not likely to be available to prosecutors in the United States. State Department regulations do not list violation of area restrictions as a basis for revoking or denying a passport. 22 C.F.R. §§ 51.70–.71 (1981). It appears that the regulations could be amended so that violation of an area restriction would be a ground for revocation. The problems of proof described for the criminal law would, however, apply here as well.

D. Export Administration Act

The Export Administration Act of 1979, 50 U.S.C. App. §§ 2401–2413 (Supp. III 1979), contains three separate grants of power to the President to prohibit or curtail the export of goods and technology subject to the jurisdiction of the United States: national security controls, foreign policy controls, and short supply controls. 50 U.S.C. App. §§ 2404, 2405, 2406.

The provision likely to be most pertinent relates to foreign policy controls.[1] On October 23, 1981, foreign policy controls were imposed on exports of aircraft and aircraft parts to Libya. 46 Fed. Reg. 53,023 (1981) (to be codified at 15 C.F.R. §§ 376, 385, 399). Previously, off-highway tractors were restricted for sale to Libya under this section. 15 C.F.R. § 385.4(e) (1981).

This Act was not employed against Iran, but was recently used to restrict exports to the Soviet Union in 1980 following the invasion of Afghanistan. 45 Fed. Reg. 1883 (1980) (to be codified at 15 C.F.R. §§ 376, 386, 399) (Restriction on the Export of Agricultural Commodities and Products to the U.S.S.R.); 45 Fed. Reg. 21,612 (1980) (to be codified at 15 C.F.R. §§ 371, 379, 385, 399) (Controls on Goods and Technology for Moscow Olympics).

The President may prohibit exports "to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations." 50 U.S.C. App. § 2405(a)(1). One of the expressly permitted purposes of foreign policy controls is discouraging the provision of aid or sanctuary to international terrorists. 50 U.S.C. App. § 2402(8).

The President's authority to impose foreign policy controls has been delegated to the Secretary of Commerce. Exec. Order No. 12,214, 45 Fed. Reg. 29,783 (1980). It must be exercised, however, in consultation with the Secretary of State. 50 U.S.C. App. § 2405(a) (Supp. III 1979).

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[1] National security controls may be imposed in order to restrict the export of goods and technology which would make "a significant contribution to the military potential of any other country," which would prove detrimental to the United States, 50 U.S.C. App. § 2402(2)(B), and which pertain to "militarily critical goods and technologies," 50 U.S.C. App. § 2404(d)(1). The Secretary cannot require a validated license unless (A) the export is restricted under a multilateral agreement; (B) with respect to the export, other nations do not possess capabilities comparable to those of the United States; or (C) the United States is seeking agreement of other suppliers to apply comparable controls. 50 U.S.C. App. § 2404(e)(2). If the President determines that goods or technology are available from foreign sources so that a specific licensing requirement would be ineffective, he may still impose controls if he finds that "the absence of export controls . . . would prove detrimental to the national security of the United States." 50 U.S.C. App. § 2404(f)(1).

Short supply controls are used "to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand." 50 U.S.C. App. § 2402(2)(C).

Certain criteria must be considered when imposing or expanding such controls. They include:

(1) The probability that they will achieve their purpose;

(2) Compatibility with foreign policy including the effort to counter terrorism;

(3) The reaction of other countries;

(4) The impact on the ability of the United States to compete economically including the effect on existing contracts;

(5) Ability to enforce the controls effectively; and

(6) The foreign policy consequences of not imposing controls.

50 U.S.C. App. § 2405(b).

The Secretary of Commerce must, in addition, take the following steps:

(a) Consult with affected industries concerning items (1) and (4), *supra;*

(b) Determine that reasonable efforts have been made to achieve the purposes of the controls through negotiations or other alternative means;

(c) Consult "in every possible instance" with the Congress;

(d) Notify Congress of the action taken; and

(e) Submit a report on items (1) through (6), *supra,* and on alternative means attempted or the reason for imposing the control without attempting alternative means. The report must also indicate how such controls will significantly further the foreign policy of the United States or will further its international obligations.

(f) Take all feasible steps to initiate and conclude negotiations with appropriate foreign governments to control exports by them of comparable goods or technology.

50 U.S.C. App. § 2405(c), (d), (e).

Criminal violators of restrictions issued for foreign policy purposes can be punished by a fine of five times the value of the export or $100,000, whichever is greater, and imprisoned for up to 10 years. Officers of corporations are not specifically covered by the penalty provision but under general principles of law can be prosecuted as violators. 18 U.S.C. § 2. *Wood* v. *United States,* 204 Fed. 55 (4th Cir. 1913), *cert. denied,* 229 U.S. 617. In addition, civil fines of up to $10,000 may be imposed by the Commerce Department. Administrative sanctions are also available including revocation of the authority to export goods or technology. 50 U.S.C. App. § 2410(b), (c).

E. The War Powers Resolution

The War Powers Resolution, 50 U.S.C. §§ 1541–1548, deals with the *procedures* which must be followed in the use of our armed forces. It includes requirements to consult with and report to Congress.

1. *Consultation.* The consultation requirement focuses on use of troops in hostile situations:

> The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

50 U.S.C. § 1542.

On its face, consultation is required with "Congress." This language replaced an earlier version which merely required consultation with the leadership and appropriate committees of Congress. H.R. Conf. Rep. No. 547, 93rd Cong., 1st Sess. 8 (1973); H.R. Rep. No. 287, 93rd Cong., 1st Sess. 6 (1973). Nevertheless, as a practical matter consultation with any more than a select group of congressional leaders has never been attempted.

In requiring consultation in "every possible instance," Congress meant to be firm yet flexible. H.R. Rep. No. 287, *supra,* at 6. The House report noted:

> The use of the word "every" reflects the committee's belief that such consultation *prior* to the commitment of armed forces should be inclusive. In other words, it should apply in extraordinary and emergency circumstances—even when it is not possible to get formal congressional approval in the form of a declaration of war or other specific authorization.
>
> At the same time, through use of the word "possible" it recognizes that a situation may be so dire, *e.g.,* hostile missile attack underway, and require such instantaneous action that no prior consultation will be possible.

Id.

President Carter determined that consultation was not "possible" prior to the Iran rescue mission because of the great need for secrecy. He indicated, however, that if the mission had not been aborted in its first phase, he planned to advise appropriate congressional leaders before the next phase, the actual rescue, took place.[2]

Consultation is only required prior to the actual "introduction" of forces into hostilities. Thus, it is not required during planning or preparation stages as long as forces have not been committed.

A determination must also be made as to when hostilities exist that require consultation. President Ford took the position, for example, that no consultation was legally required at the Danang or Lebanon evacuations because hostilities were not involved. Franck, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power,* 71 Am. J. Int'l L. 605, 615 (1977). The State and Defense Departments have said that "hostilities" mean a situation in which American forces are actively exchanging fire with opposing units and "imminent hostilities" mean a situation where there is a serious risk from hostile fire to the safety of U.S. forces. Neither term was thought to encompass irregular or infrequent violence which may occur in a particular area. *War Powers: A Test of Compliance, Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident, Hearings Before the Subcomm. on Int'l Security and Scientific Affairs of the House Comm. on Int'l Relations,* 94th Cong., 1st Sess. 38–39, 85–86 (1975).

2. *Reporting requirements.* The reporting requirements apply to situations not only where hostilities are taking place or imminent (which requires consultation) but where armed forces are sent to a foreign country equipped for combat. 50 U.S.C. § 1543. The report must be filed within 48 hours. This has been interpreted as meaning 48 hours from the time that they are "introduced" into the situation triggering the requirement and not from the time that the decision to dispatch them is made. *E.g.,* Franck, *supra,* at 615. The report must include:

> (1) The circumstances necessitating the introduction of United States Armed Forces;
>
> (2) The constitutional or legislative authority under which such introduction took place; and
>
> (3) The estimated scope and duration of the hostilities or involvement.

Franck, *supra,* at 614–15.

Reports filed in the past have been brief and to the point; they have not run more than one or two pages. The discussion of legal authority in the reports has been limited to a brief reference to the constitutional power of the President as Commander-in-Chief and Chief Executive. This Administration took the position that the incident earlier this year where two Libyan planes were shot down over the Mediterranean did not implicate either the consultation or reporting provisions.

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[2] Statement of Acting Secretary of State Christopher, May 8, 1980, to Senate Foreign Relations Comm., p. 5. Although the Acting Secretary's statement was phrased in statutory terms, the consultation requirement raises a constitutional question as to a possible limit on the President's independent power. Testimony of State Department Legal Adviser Monroe Leigh in *War Powers: A Test of Compliance, supra,* at 100.

The resolution includes in its statement of purpose and policy a list of situations in which the President is authorized to introduce the Armed Forces into hostilities or situations of imminent hostility. This may be done: (1) pursuant to a declaration of war; (2) under specific statutory authorization, or (3) in a national emergency created by an attack upon the United States, its territories or possesions or its armed forces. 50 U.S.C. § 1541(c). We do not believe, however, that the purpose and policy statement should be construed to constrain the exercise of the President's constitutional power. The Resolution's policy statement is not a comprehensive or binding formulation of the President's powers as Commander-in-Chief. *See* H.R. Conf. Rep. 547, 93rd Cong., 1st Sess. 8 (1973) (stating that subsequent sections of the Resolution are not dependent on the policy statement). The Resolution itself disclaims any intent to alter the constitutional power of the President. 50 U.S.C. § 1547(d)(1).

Finally, the Resolution provides that Congress may, by concurrent resolution, force the withdrawal of our armed forces from abroad. 50 U.S.C. § 1544(c). This "legislative Veto" device is, in our view, unconstitutional. *See* Veto of the War Powers Resolution, 1973 Pub. Papers of Richard Nixon 893 (Oct. 24, 1973).

F. Powers Relating to Libyan Nationals

The Immigration and Nationality Act, 8 U.S.C. §§ 1101–1525 (1976 ed. and Supp. III 1979), provides the Executive with broad powers to restrict the entry of aliens into the United States and to deport them.

The President may issue regulations governing the entry and departure of aliens from the United States. It is unlawful

> for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe . . . .

8 U.S.C. § 1185(a)(Supp. III 1979). In addition, the President may suspend the entry of aliens by designated classes:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrant or nonimmigrants, or impose

> on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f).

In the Iran crisis, the President delegated to the Secretary of State and the Attorney General the powers of the President under 8 U.S.C. § 1185 to prescribe limitations respecting visas issued to Iranians. Exec. Order No. 12,172, 44 Fed. Reg. 67,947 (1979), as *amended by* Exec. Order No. 12,206, 45 Fed. Reg. 24,101 (1980). Under this order, the State Department issued regulations requiring all outstanding visas of Iranian nationals to be re-endorsed and for new visas to be issued only under strict standards. 22 C.F.R. § 46.8 (1981). Sections 1182 and 1185 were the authority for Proclamation 4865, 46 Fed. Reg. 48,107 (1981), and Executive Order No. 12,324, 46 Fed. Reg. 48,109 (1981) concerning interdiction of aliens on the high seas.

In addition, the Attorney General can issue regulations to carry out the immigration laws, 8 U.S.C. § 1103(a), and is charged with insuring that aliens who have not maintained their status under the law depart from the United States, 8 U.S.C. § 1184(a). These powers are delegated to the Commissioner of Immigration and Naturalization. 28 C.F.R. § 0.105 (1981). In 1979 the Immigration and Naturalization Service (INS) issued regulations requiring Iranian students to report to the INS and submit evidence that they had maintained eligibility as students under the immigration laws. 8 C.F.R. § 214.5 (1981). Subsequently, the INS provided for the accelerated departure of all Iranians who were judged deportable by limiting the amount of time permitted for departure. 8 C.F.R. § 242.5 (1981). These INS regulations were upheld in subsequent litigation as a valid exercise of the Attorney General's statutory power. The courts held that the regulations had a rational basis and did not therefore deprive Iranians of equal protection of the laws. *Narenji* v. *Civiletti,* 617 F.2d 745 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 957 (1980); *Malek-Marzban* v. *INS,* 653 F.2d 113 (4th Cir. 1981); *cf. Yassini* v. *Crosland,* 618 F.2d 1356 (9th Cir. 1980).

Apart from the statute below dealing with enemy aliens, there is no law which specifically provides the power to expel aliens who are in this country lawfully as permanent residents or nonimmigrants and who are not otherwise subject to deportation.

The President has statutory authority to intern or expel enemy aliens. This power is available, however, only in time of war, invasion, or predatory incursion. 50 U.S.C. § 21. The Supreme Court has held this provision constitutional. *Ludecke* v. *Watkins,* 335 U.S. 160 (1948).

For your information, we are attaching: (1) examples of orders which have been issued in the past; and (2) a listing of major opinions, including subject headings issued by this Office during the Iranian crisis. The latter attachment demonstrates the broad range of actions which were considered during that crisis.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Defending the Revocation of the Tax-Exempt Status of Certain Private Schools in Light of the Ashbrook Amendment

The Ashbrook amendment's limitation on the expenditure of appropriated funds by the Internal Revenue Service (IRS) on actions that would cause the revocation of a school's tax-exempt status applies only prospectively, and revocation notices issued prior to its effective date thus remain valid.

A bar on the expenditure of appropriations which does not amend underlying substantive law will not lightly be interpreted to prohibit the Executive from appearing in court to defend legally authorized actions previously taken.

Neither the plain language nor the legislative history of the Ashbrook amendment suggests a congressional intent to bar IRS from defending its valid revocation notices in a court proceeding, though the manner in which IRS defends its revocation notices may be relevant to whether it is complying with the spirit as well as the letter of the Ashbrook amendment.

December 24, 1981

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF THE TREASURY

In connection with our analysis of the ramifications of the Ashbrook amendment, § 616 of H.R. 4121, 97th Cong., 1st Sess. (1981), for future actions of the Department of the Treasury, you have requested an early response to the question whether your Department may engage in certain pending litigation. Specifically, may the Internal Revenue Service (IRS), through its Office of the Chief Counsel, consistent with the Ashbrook amendment, answer and defend petitions filed in the United States Tax Court by five formerly tax-exempt nonsectarian private schools challenging the revocation of their tax-exempt status under § 501(c)(3) of the Internal Revenue Code of 1954 (Code) 26 U.S.C. § 501(c)(3)? The notices of revocation, dated August 17, 1981, concluded that each of the five schools "no longer qualifies for continued exemption under section 501(c)(3)." These revocations occurred at a time when the IRS was, as it continues to be, subject to an injunction issued by the district court in *Green* v. *Miller,* No. 69-1355 (D.D.C. May 5, 1980) (clarified and amended June 2, 1980), the general thrust of which is to require the IRS to enforce more vigorously the implied prohibition in § 501(c)(3) on the eligibility for tax-exempt status of private, nonprofit schools which discriminate on the basis of race.

We do not, in this memorandum, attempt to resolve the plethora of complex questions—including those articulated by Secretary Regan in his letter to the Attorney General dated October 1, 1981—raised by the Ashbrook amendment. The Supreme Court may resolve some of these questions in the cases of *Goldsboro Christian Schools, Inc.* v. *United States* and *Bob Jones University* v. *United States, cert. granted,* 454 U.S. 892 (1981), and *Regan* v. *Wright.** For present purposes, we shall simply assume, without reaching questions of constitutionality, that the Ashbrook amendment was intended, at least in part, to restrict your Department's ability to comply with the injunction issued in *Green* v. *Miller.* We conclude, for the reasons set forth below, that the IRS may file answers to and defend the five petitions without violating any constraints the Ashbrook amendment may otherwise have placed on the IRS' administration of the Code.

I. Background

The history of the *Green* and *Wright* cases, and their interrelationship with the Ashbrook amendment, is extraordinarily complex.[1] However, a detailed recapitulation of that history is unnecessary for resolution of the present problem. Briefly, prior to 1970, the IRS as a general rule recognized non-profit private schools not receiving state aid as tax-exempt, charitable institutions under § 501(c)(3) of the Code and as eligible donees of charitable contributions deductible under § 170(a) and (c)(2) of the Code regardless whether the school was racially discriminatory. In 1971, the district court in *Green* v. *Connally,* 330 F. Supp. 1150, 1171, 1179 (D.D.C.) (three-judge court), *aff'd mem. sub nom. Coit* v. *Green,* 404 U.S. 997 (1971), held, as a matter of statutory interpretation, that the Internal Revenue Code requires denial of tax-exempt status and deductibility of contributions to private schools practicing racial discrimination.[2] Plaintiffs in *Green* reopened the litigation in 1976, alleging that the IRS had failed to enforce effectively the earlier order that racially discriminatory private schools in Mississippi be denied tax-exempt status.[3] That action resulted in a modified and ampli-

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*Note: The Supreme Court's opinion in *Bob Jones University* v. *United States* is printed at 461 U.S. 574 (1983); its opinion in the *Wright* case appears at __ U.S. __, 104 S. Ct. 3315 (1984), *sub nom. Allen* v. *Wright.* Ed.

[1] *See Wright* v. *Regan,* 656 F.2d 820, 823–26 (D.C. Cir.) (1981) (detailing history of the case); Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools,* 93 Harv. L. Rev. 378, 379–84 (1979). *See also* Neuberger & Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration,* 48 Fordham L. Rev. 229 (1979) (general discussion of court, agency, and congressional action in this area).

[2] To support this determination, the court reasoned that with respect to private schools, § 501(c)(3) must be read in a manner consistent with federal civil rights legislation and the overriding national policy against racial discrimination in educational facilities. *See also Runyon* v. *McCrary,* 427 U.S. 160 (1976); *Brown* v. *Board of Education,* 347 U.S. 483 (1954); § 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1981; Pub. L. No. 94–568, Sec. 2(a), 90 Stat. 2697 (1976) (prohibition of tax-exempt status for social club whose charter or governing instrument provides for discrimination).

[3] At the same time, parents of black children in desegregating school districts in seven states commenced a class action seeking nationwide relief on a basis similar to that sought in Mississippi in

Continued

fied injunction against the IRS which went beyond the guidelines the IRS had adopted in the wake of the first *Green* decision to determine whether schools seeking or holding exempt status are in fact discriminatory.[4] The district court enjoined the IRS from granting tax-exempt status to private Mississippi schools: (1) adjudged racially discriminatory in adversary or administrative proceedings; or (2) established or expanded at the time of local public school desegregation *unless* the schools "clearly and convincingly" demonstrate that they observe nondiscriminatory policies and practices in "admissions, employment, scholarships, loan programs, athletics and extra-curricular programs." *Green* v. *Miller,* No. 69-1355, at 2 (D.D.C. May 5, 1980) (clarified and amended June 2, 1980).[5] Subsequent to the court order, the IRS, in the course of its surveys and examinations of private schools, sent the five notices of revocation of tax-exempt status that are presently being challenged in the Tax Court under 26 U.S.C. § 7428.[6]

In order to determine whether those actions can now be answered and defended in Tax Court, they must be viewed against the backdrop of the Ashbrook amendment. Section 616, which Congressman Ashbrook offered as an amendment to the Treasury Department, Postal Service, and General Government Appropriations Bill for the fiscal year 1982, provides:

> None of the funds made available pursuant to the provisions of this Act shall be used to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, court order, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978.

Section 616 passed the House on July 30, 1981. *See* 127 Cong. Rec. H5398 (daily ed. July 30, 1981). It was approved by the Senate Committee on Appropriations on September 15, 1981. *See* 127 Cong. Rec. D1057 (daily ed. Sept. 15, 1981). Although the House bill has not yet

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the reopened *Green* case. *See Wright* v. *Regan,* 656 F.2d 820, 825, 829-30, 835 (D.C. Cir. 1981). While *Green* has a long history and involves Mississippi schools alone, the issues in the two cases are essentially the same. Moreover, the original *Green* court specifically noted that its interpretation of § 501(c)(3) was not confined to the situation in Mississippi. Rather "[t]he underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt." *Green* v. *Connally,* 330 F. Supp. at 1174. The Ashbrook amendment does not, on its face, distinguish between schools inside and outside Mississippi.

[4] *See, e.g.,* Rev. Proc. 72-54, 1972-2 C.B. 834; Rev. Proc. 75-50, 1975-2 C.B. 587.

[5] The district court has subsequently stayed its order insofar as it applies to private sectarian schools. *See* Suspension of Court's Orders of May 5, 1980, and June 2, 1980 (D.D.C. July 13, 1981).

[6] Section 7428 of Title 26 provides that an organization whose qualification, or classification under § 501(c)(3) is in issue may file within 90 days a petition in the United States Tax Court, the United States Court of Claims, or the district court of the United States for the District of Columbia, seeking a declaratory judgment with respect to such initial qualification, continuing qualification, or revocation.

been enacted, the restrictions contained in § 616 were temporarily effective from October 1, 1981, until November 20, 1981, pursuant to Pub. L. No. 97-51, 95 Stat. 958 (1981), the continuing Appropriations Act. That Act was extended, by amendment, to December 15, 1981. *See* Pub. L. No. 97-85, 95 Stat. 1098 (1981). On December 15, a joint resolution further extending these conditions for fiscal year 1982, became law. *See* Pub. L. No. 97-92, 95 Stat. 1183 (1981).[7]

Section 616 is Congress' most recent attempt to limit what it perceives to be unwarranted governmental interference with private sectarian and nonsectarian schools. The amendment is substantially similar to amendments sponsored by Congressmen Ashbrook and Dornan to Treasury appropriations for fiscal years 1980 and 1981.[8] These "riders" were intended to preserve guidelines the IRS had adopted prior to August, 1978 to identify racially discriminatory private schools and to prevent the IRS from augmenting those guidelines with more aggressive procedures and detailed reporting requirements. *See* 125 Cong. Rec. 18,444-50 (1979); *id.* at 18812-16 (1979); *id.* at 22,876-928 (1979); *id.* at 23,204-11 (1979); 126 Cong. Rec. 15,383 (1980); *id.* at 21,981-90 (1980); *id.* at 22,166-70 (1980). Originally, these provisions were explained as attempts to rechannel the responsibility for formulating tax policy from the IRS to Congress or the courts,[9] and they have been so interpreted by a court.[10]

The fiscal year 1982 Ashbrook amendment differs, however, in scope and impact: the earlier language was altered by inserting "court order."[11] Inasmuch as the Ashbrook amendment can now be read on its face to prohibit the use of appropriations to "carry out any . . . court order . . . which would cause the loss of tax-exempt status . . . unless in effect prior to Aug. 22, 1978," there may be conflicts between § 616 and the obligations of the IRS under the modified *Green* injunction. The specific potential conflict at issue here is whether § 616 affects the IRS's ability to defend the actions brought in the Tax Court.

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[7] Similar to Pub. L. No. 97-51, a proviso to § 101(a)(3) of Pub. L. No. 97-92 states that "when an Act listed in this subsection has been reported to a House, but not passed by that House as of December 15, 1981, it shall be deemed as having been passed by that House." The Treasury, Postal Service, and General Government Appropriations Act of 1982 is listed in subsection (a) and has been reported to the floor of the Senate by the Senate Committee on Appropriations. Thus, the amendment involved here is now effective.

[8] *See* Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559, §§ 103, 615 (1979); restriction reinstated on December 16, 1980, effective through September 30, 1981, Pub. L. No. 96-536, 94 Stat. 3166, §§ 101(a)(1), 101(a)(4) (1980); as amended Pub. L. No. 97-12, 95 Stat. 95, § 401 (1981).

[9] *See* 125 Cong. Rec. 18,447 (1979) (remarks of Rep. Ashbrook).

[10] *See Wright* v. *Regan*, 656 F.2d 820, 835 (D.C. Cir. 1981) ("riders are holding orders and they hold only the IRS, they do not purport to control judicial dispositions."), petition for *certiorari* filed, *Regan* v. *Wright*, No. 81-970 (Nov. 23, 1981).

[11] *See* 127 Cong. Rec. H5392, 5398 (daily ed. July 30, 1981).

II. Analysis

The first question to be addressed is whether the notices of revocation sent out by the IRS on August 17, 1981, are themselves nullified by the Ashbrook amendment, which became operative on October 1, 1981. The plain language of § 616 does not indicate that it should apply retroactively. As written, it is future-oriented: no appropriations "shall be used," not "no appropriations should have been used." Nor could a provision forbidding the use of appropriations logically be read to make prior expenditures illegal. Were that possible, persons who had properly authorized the obligation of appropriations under the previous law could be subjected, *ex post facto*, to criminal prosecution under the Antideficiency Act, 31 U.S.C. § 665, in violation of the Constitution. U.S. Const., Art. I, § 9, cl. 3.[12]

In addition, a general rule of statutory construction is that retroactive application of statutes is not assumed absent explicit congressional intent to the contrary. *See Nichols* v. *Coolidge*, 274 U.S. 531, 542 (1927) (tax which applied retroactively so as to burden past lawful transactions violated Fifth Amendment); *Billings* v. *United States*, 232 U.S. 261, 282 (1914) (statutes should be so construed as to prevent them from operating retroactively). We have carefully reviewed the legislative history and find no evidence whatsoever that Congress intended § 616 to apply retroactively.[13] We therefore conclude that § 616 in no way affects the administrative actions taken by the IRS on August 17, 1981.[14]

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[12] We note that the Ashbrook amendment to the 1980 Appropriations Act, which was the governing law prior to October 1, 1981, did not prohibit any actions taken pursuant to a court order. (Section 103 of the Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96–74, 93 Stat. 562, expired on September 30, 1980, the end of the 1980 fiscal year, but was reinstated for the period December 16, 1980, through the close of the 1981 fiscal year, by § 101(a)(4), H.R. J. Res. 644 of Dec. 16, 1980, Pub. L. No. 96–536, 94 Stat. 3166, as amended by § 401, Supplemental Appropriations and Rescission Act, 1981, Pub. L. No. 97–12, 95 Stat. 95.) That section read:

> None of the funds made available pursuant to the provisions of this Act shall be used to formulate of carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978.

When Congressman Ashbrook initially proposed § 103, he described it as a holding order on the IRS, not the courts. "We are just saying do not go forward with these broad regulations or procedures, . . . until the Congress or a court affirmatively acts on that subject." 125 Cong. Rec. 18,447 (1979) (remarks of Rep. Ashbrook). Thus, neither the plain language nor the legislative history of the 1980 fiscal year Ashbrook amendment—the applicable law on August 17, 1981—prohibited sending out the revocation letters.

Although Congressman Ashbrook attempted to expand the scope of his amendment a year later so as to affect court orders as well, the Chair ruled that the amendment was out of order. 126 Cong. Rec. 21,980 (1980). Congressman Ashbrook then offered an alternative version which was adopted by the House, with respect to which he stated: "The new version of the amendment does not challenge the May 5 *Green* order, . . . it does not address or seek to alter the order of Judge Hart in the *Green* case or the implementation of that order in the State of Mississippi." 126 Cong. Rec. 22,166 (1980). This amendment never became law, because Congress failed to pass the 1981 fiscal year Appropriations Act. Funding was authorized pursuant to a continuing budget resolution which incorporated existing 1980 restrictions, including the earlier Ashbrook amendment. But at no point prior to the appropriation rider for 1982 did Congress regard either the Ashbrook or Dornan amendments as interfering with the enforcement of outstanding court orders. *See also* 126 Cong. Rec. 17,508 (remarks of Sen. Javits) (1980); 126 Cong. Rec. at 21,963 (remarks of Rep. Dornan) (1980); *id.* at 21,984 (ruling of the Chair).

The next question is whether the IRS can defend challenges to those revocation notices brought under 26 U.S.C. § 7428 and filed in the Tax Court on November 17, 1981. Under rules of the Tax Court, the IRS must respond to at least one of the five petitions by January 11, 1982. We understand from IRS attorneys that the proceedings before the Tax Court will be ones in which any facts upon which the administrative determinations were made may be determined *de novo* by the Tax Court at trial of the causes. Any relevant evidence supporting contentions raised during the administrative revocation process may be raised before the Tax Court by either the IRS or the organization. *See Incorporated Trustees of the Gospel Workers Society* v. *United States,* 81-1 USTC ¶ 9174, n.6 (D.D.C. 1981). *But cf. Prince Edward School Foundation* v. *C.I.R.,* 478 F. Supp. 107, 110 (D.D.C. 1979) *aff'd by unpublished order,* No. 79-1622, *cert. denied,* 450 U.S. 944 (1981) (judicial review limited to review for error of administrative determination). In its answers to the five petitions, the IRS expects to deny most of the paragraphs of the petitions. Trial would not be held in any of the cases until May 1, 1982, at the earliest, with legal memoranda to be submitted subsequent to the trial.

The plain language of § 616, while prohibiting the use of funds either to formulate rules and regulations or to carry out guidelines or court orders which were not in effect prior to August 22, 1978, does not address specifically the appearance of the Executive in court. We would generally be most reluctant to give § 616 a reading that Congress intended to bar the Executive from performing its quintessential function of appearing in court to support legally authorized actions it had previously taken. We would be particularly reluctant to give such a reading to a statute making appropriations (and, as here, denying the use of appropriations), because such a statute does not amend underlying substantive law—it merely suspends the use of appropriations for so long as the statute remains in force. It would also, we believe, be anomalous to attribute to Congress in 1981 an intent on the one hand to leave the notices of revocation unchanged and an intent on the other hand to prohibit the defense of those administrative notices in the Tax Court. Such potentially inconsistent effects should be resolved, if possible, in favor of permitting the agency to defend its prior, permissible actions, rather than forcing a reading that would require the Executive to default in court. Moreover, our earlier conclusion—that Congress did not intend to nullify the letters of revocation—leaves the underlying substantive rule of law to be relied upon in the Tax Court outstanding. *Cf. Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 59 U.S. (18 How.) 421 (1855) (Congress explicitly changes the substantive rule of law supporting prior decision.). If neither § 501(c)(3) nor the notices of revocation have been amended or extinguished, it would be illogical to find in the Ashbrook amendment an intent to prohibit the Executive from responding to challenges to the revocation letters.

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[13] *See* 127 Cong. Rec. H5392-98 (daily ed. July 30, 1981). Indeed, during floor debate over his 1982 fiscal year version, Congressman Ashbrook himself expressed doubts that even that proposal would affect the ability of the IRS to comply fully with the *Green* v. *Miller* injunction within the State of Mississippi. *See* 127 Cong. Rec. H5394 (daily ed. July 30, 1981) (exchange between Reps. Ashbrook and Gradison). We assume for present purposes that the 1982 fiscal year version was intended to interdict compliance with the *Green* v. *Miller* order after October 1, 1981, without deciding that issue.

[14] Analogously, the court of appeals in *Wright* v. *Regan,* 656 F.2d at 832-35, reached a parallel conclusion that the enactment by Congress of the Ashbrook amendment (§ 103) and Dornan amendment (§ 615) to the Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559, was prospective in operation: an attempt to stay further IRS initiatives.

Notwithstanding these considerations, however, the complex history of the Ashbrook amendments suggests that we should examine the manner in which the defense in the Tax Court might be construed as carrying out a court order, namely the *Green* v. *Miller* injunction, entered *after* August 22, 1978, and therefore as potentially violative of the spirit of the Ashbrook amendment. Significantly, the modified *Green* v. *Miller* injunction does not mention the issue of the IRS defending actions in the Tax Court. Nor would the district court judge presume to dictate the proceedings in another tribunal. *Cf. GTE Sylvania, Inc.* v. *Consumers Union of the United States,* 445 U.S. 375 (1980) (agency complying with order in one court's proceeding should not be required to commit contempt of that court because of contradictory order from another court). The Tax Court functions independently in determining what legal standard should govern under the present circumstances and whether or not the petitioner organizations are tax-exempt. *See Prince Edward School Foundation* v. *C.I.R.,* 478 F. Supp. 107, 111–12 (D.D.C. 1979), *aff'd by unpublished order,* No. 79–1622 (D.C. Cir. June 30, 1980), *cert. denied,* 450 U.S. 944 (1981) (validity of particular revenue procedure does not bear on court's interpretation of the prerequisites for § 501(c)(3) status and its ultimate decision whether or not plaintiff is exempt under that section). Therefore, the IRS, as an initial matter, would not logically turn to the rules developed in the recent *Green* order for instruction as to its present defense to the challenges under 26 U.S.C. § 7428 in the Tax Court.

Several options, independent of the modified *Green* injunction and compatible with the Ashbrook amendment, would be available to the IRS in the Tax Court proceedings. The IRS could base its defense of the revocations on a determination that the schools involved have violated Rev. Proc. 75–50 or other pre-August 22, 1978, law, either by failing to demonstrate affirmatively the adoption, communication, and observance of a nondiscriminatory policy or by failing to fulfill the equivalent duty of a meaningful communication of a nondiscriminatory policy.[15] Under this analysis, the IRS would take the position that the schools have allegedly failed to demonstrate that they operate on a racially nondiscriminatory basis in conformity with the original order in *Green* v. *Connally,* 330 F. Supp. 1150 (D.D.C.) (three-judge court) *aff'd sub nom. Coit* v. *Green,* 404 U.S. 997 (1971), and Rev. Proc. 75–50, both of which were consciously left undisturbed by the Ashbrook amendment.

It is also possible that, at some time during the litigation in the Tax Court, the IRS might desire to argue that the schools had not successfully rebutted a factual inference of discrimination raised by the circumstances surrounding their creation, or their substantial expansion, at approximately the time of a local desegregation order. While such a position could arguably be linked to the language of the modified *Green* v. *Miller* injunction, the IRS had actual knowledge of the relevant facts surrounding the schools' formation independent of that court order. *See Coffey* v. *State Educational Finance Commission,* 296 F. Supp. 1389 (S.D. Miss. 1969) (three-judge court); *Green* v. *Connally,* 330 F. Supp. at 1173–74; *Norwood* v. *Harrison,* 382 F. Supp. 921, 924–26 (N.D. Miss. 1974). These cases treated evidence of a school's formation or expansion at times reasonably proximate to public school desegregation litigation as sufficient to create a "badge of doubt." The IRS could assert this well-recognized and accepted inference in its present defense should it choose to rely on that inference.[16]

Another aspect of the Tax Court defenses which arguably could be viewed as "carrying out" the modified *Green* v. *Miller* injunction in violation of § 616 would involve the IRS' resort to the "clear and convincing" evidence standard that the modified *Green* decree imposes on the schools in order to overcome a *prima facie* case of discrimination. Of course, the IRS has no way of predicting exactly what burdens of proof the Tax Court might eventually place on the litigants.[17] We are informed that a "clear and convincing" standard of proof is extremely rare in Tax Court proceedings. Moreoever, as indicated above, the district court in *Green* in no way displayed a purpose to prescribe the rebuttal standard to be employed in the Tax Court.

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[15] Rev. Proc. 75–50, Sec. 2.02 specifically requires that "[a] school must show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy it has operated in a bona fide manner in accordance therewith." *See also Green* v. *Connally,* 330 F. Supp. 1150, 1179 (D.D.C. 1971) (three-judge court) (school must publicize policy in manner that is intended and reasonably effective to bring it to attention of students of minority groups).

[16] *See also Brumfield* v. *Dodd,* 425 F. Supp. 528, 531–32 (E.D. La. 1977) (adopting *Norwood* v. *Harrison,* 382 F. Supp. 921, 925 (N.D. Miss. 1974), standard that "the critical time of a private school's formation or unusual enlargement must be a significant factor, though one not necessarily decisive, in determining whether it is racially discriminatory").

[17] *See Prince Edward School Foundation* v. *C.I.R., supra* at 110–11; *Western Catholic Church* v. *Commissioner,* 73 T.C. 196, 206 (1979); *Hancock Academy of Savannah, Inc.* v. *Commissioner,* 69 T.C. 488, 492 (1977) (burden of proof on petitioner; exact standard not addressed).

More importantly, should the IRS, to sustain its case, desire to argue that such a standard should control, it need not invoke the modified *Green* injunction to support its position. Rather, it can point to the burdens of proof developed in *Norwood* v. *Harrison,* 382 F. Supp. at 924–26, on remand from the Supreme Court, 413 U.S. 455, 471 (1973); an approach reaffirmed in *Brumfield* v. *Dodd,* 425 F. Supp. 528, 531–32 (E.D. La. 1977).[18] These cases predate August 22, 1978, and we do not read the Ashbrook amendment as intending to affect these decisions or to prohibit the IRS from arguing their relevance and applicability in the Tax Court proceedings. Given these precedents and the lack of a firm position by the IRS whether the *Norwood* inference should apply at all, we see no conflict, at least in the immediate future, between the Ashbrook amendment and the filing of an answer to the five petitions in the Tax Court or, generally, the defense of those actions.

At a more fundamental level, the IRS defense does not violate the basic thrust of § 616. Congress neither intended to change the law proscribing tax-exempt status for discriminatory schools nor desired to impinge on the IRS' ability to withdraw the tax-exempt status of schools that do discriminate. Indeed, in reiterating his initial intention this year, Congressman Ashbrook stated:

> I made it clear at the time that IRS should be able to proceed on the basis of the regulations they had in existence. If they know of discrimination, they can litigate, they can withdraw the tax-exempt status, anything that they could do prior to August 22, 1978, the time when they endeavored to implement these Draconian regulations, could be implemented by IRS. In no way am I trying to impinge on IRS's ability to withdraw the tax-exempt status of any school which might violate the law.

127 Cong. Rec. H5395–96 (daily ed. July 30, 1981).[19] These proceedings will give the court an opportunity to consider what rules should be used to determine nondiscrimination—a result sought by Congressman Ashbrook when he first introduced his amendment.[20] Thus, the Tax

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[18] Similarly, the court in *United States* v. *State of Mississippi,* 499 F.2d 425, 434–35 & n.17 (5th Cir. 1974) (*en banc*) interpreted *Norwood* to require that the litmus test for receiving governmental support was *actual* evidence of nondiscrimination, not a simple statement of a nondiscriminatory policy.

[19] *See also* 127 Cong. Rec. H5398 (daily ed. July 30, 1981) (remarks of Rep. Lott) ("If this amendment passes, the IRS will still be free to investigate charges of racial discrimination. It will be free to deny exemptions to any institution proven guilty of racial discrimination through fair hearings. In short, it will be free to enforce the regulations and court orders in effect in 1978.").

[20] The governing statute, 26 U.S.C. § 7428(c)(1), explicitly provides that any individual contributions up to $1,000 made to the school during the pendency of the proceedings are deductible, regardless of the eventual outcome of the litigation. Congress fashioned the proceeding involved here in response to the Supreme Court's suggestion that "[s]pecific treatment of not-for-profit organizations to allow them to seek pre-enforcement review" might be a method for alleviating "[t]he degree of bureaucratic control that, practically speaking, has been placed in the Service [and] . . . is susceptible of abuse, regardless of how conscientiously the Service may attempt to carry out its responsibilities." *Bob Jones University* v. *Simon,* 416 U.S. 725, 749–50 (1974). *See* H.R. Rep. No. 658, 94th Cong., 1st Sess. 282, 283–84 (1975); S. Rep. No. 938, 94th Cong., 2d Sess. 585–87 (1976) (basis for enacting § 1306(a), Tax Reform Act of 1976, Pub. L. No. 94–455, 90 Stat. 1520).

Court proceedings function to further, rather than to undermine, the spirit of the Ashbrook amendment. We therefore conclude that the IRS defense in the Tax Court violates neither the letter nor the spirit of § 616.

We are continuing our review of other issues raised in the Secretary's letter to the Attorney General, particularly the potential effect of the Ashbrook amendment on the responsibility of the IRS to notify two "paragraph 1" schools [21] of their reporting obligations under the modified *Green* injunction. We will remain in touch with your office and IRS attorneys in our efforts to resolve this matter.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

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[21] Paragraph 1 schools are schools which in the past have been determined in court or administrative proceedings to be racially discriminatory, or were established or expanded at or about the time the districts in which they are located were undergoing desegregation and which cannot demonstrate that they do not presently discriminate. *See Green* v. *Miller,* No. 69-1355, Order and Permanent Injunction (D.D.C. May 5, 1980) (clarified and amended, June 2, 1980). Even if the school establishes that it observes a nondiscriminatory policy, the IRS is enjoined from continuing its tax-exempt status if the school fails to supply certain information annually for a period of three years.

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